



**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

CASE NO: 53379/2019

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: YES	(2) OF INTEREST TO OTHERS JUDGES: YES
(3) REVISED. ✓	
15/1/2021	
DATE	SIGNATURE

In the matter between:

EZULWINI MINING COMPANY PTY LTD

Applicant

And

MINISTER OF MINERAL RESOURCES AND ENERGY

First Respondent

MINISTER OF ENVIRONMENT,

FORESTRY AND FISHERIES

Second Respondent

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 OPERATIONS LIMITED

Sixth Respondent

JUDGMENT

FABRICIUS J

[1] In these proceedings applicant (hereinafter “EMC”) instituted motion proceedings on 24 July 2019 in terms of which the following relief was sought:

“ 1. Declaring that:

1.1 neither an environmental authorisation in terms of the National Environmental Management Act 107 of 1998 and the Environmental Impact Assessment Regulations published in GN R982 in GG 38282 of 4 December 2014;

1.2 nor an amendment to the water use licence issued to the Applicant in terms of the National Water Act 36 of 1998;

are required by the applicant to cease the pumping of the water from the defunct underground workings of Ezulwini mine located on the farms Jachtfontein 344, Klipgat 700, Modderfontein 345 and Waterpan 292, Registration Division IQ, situated in the Rand West City Local Municipality, within the West Rand District Municipality.

2. Alternatively, and to the extent that the Court find that an environmental authorisation or a water use license amendment is required by the applicant to cease the pumping of water from the defunct underground workings at the Ezulwini mine, declaring that:

2.1 in light of the prejudicial financial consequences, physical constraints and potential health and safety consequences of the continued pumping, as well as the findings of the extensive impact assessment studies completed by the applicant, the applicant is entitled to cease the

pumping of water from the defunct underground workings at the Ezulwini mine in the absence of such environmental authorisation or water use license amendment;

3. Further alternatively, and to the extent that the Court finds that an environmental authorisation or a water use license amendment is required by the applicant to cease the pumping of water from the defunct underground workings at the Ezulwini mine, and that the applicant is not entitled to cease the pumping of water from the defunct underground workings at the Ezulwini mine in the absence of such environmental authorisation or water use license amendment, directing that:

- 3.1 the fifth and sixth respondents either cover the costs of pumping water from the defunct underground workings at Ezulwini mine or contribute to such cost together with the applicant, the fifth and sixth respondents being jointly and severally liable, alternatively, directing the first and/or second and/or third and/or fourth respondents to order the fifth and sixth respondents to do so.

4. Directing such respondents who may oppose this application to pay the costs thereof, including the costs of two counsel, jointly and severally, the one paying the others to be absolved."

[2] It cited 5th and 6th respondents (the 6th being referred to hereinafter as "Gold Fields") in their capacity as the holders of undivided 50% shares of the mining rights in relation to the South Deep Mine, which is an incorporated joint venture (known as South Deep Joint Venture) and were therefore the owners and operators of South Deep Mine.

[3] The 7th respondent is a partnership that has its address at Portion 38 of the Farm Gemspost 288, Westonaria. It was joined for the interest it may have in

the application but no relief was sought against it, save for costs in the event of opposition.

[4] BACKGROUND:

In its Founding Affidavit the applicant sets out the purpose and background of the application in some detail and I deem it convenient to quote the relevant paragraphs: (It must be noted that I am making no factual findings by doing so).

- “18. In May 2014, EMC acquired the underground and surface operations of a gold and uranium mine which had commenced operations in the 1960s.
19. The mine, now known as the Ezulwini mine (“**Ezulwini**”) or Cooke 4, after the Cooke 4 Shaft, is located approximately 8 km south-east from the town Westonaria in Gauteng on the following farms: Jachtfontein 344, Klipgat 700, Modderfontein 345 and Waterpan 292, Registration Division IQ, situated in the Rand West City Local Municipality, within the West Rand District Municipality.
20. In September 2016, EMC ceased underground mining operations at Ezulwini as the underground mine was no longer economically viable. Surface mining-related operations, including in particular, gold metallurgical processing operations, are however ongoing at Ezulwini.
21. In order to undertake the underground mining operations at Ezulwini, EMC and its predecessors pumped groundwater from the underground workings which resulted in the dewatering of the Gemsbokfontein West Dolomitic Compartment. Such dewatering took place pursuant to permits issued to EMC’s predecessors in terms of the now repealed Water Act 54 OF 1956 and in terms of a water use license (“**WUL**”) issued to EMC in 2015 in terms of the NWA.
22. Notwithstanding the cessation of underground operations at Ezulwini, EMC continues to pump and treat the water from the underground workings at a cost of approximately R21.1 million per month at present.

23. For reasons which will be set out later in the affidavit, the continued pumping of this groundwater in circumstances where the underground workings at Ezulwini have ceased, is financially and physically impossible to sustain and poses potentially considerable health and safety risks to EMC's employees. Furthermore, the findings of the detailed impact and risk assessment studies conducted by EMC show that re-watering is an acceptable closure option provided that the recommendations and mitigation measures option provided that the recommendations and litigation measures proposed by the specialists are implemented. Accordingly, EMC intends to cease the pumping of water from the defunct underground workings at Ezulwini.

24. The cessation of pumping of underground water will result in the water levels in the underground mine workings and above-lying dolomitic compartment recovering over time. At this stage it is anticipated that the Gemsbokfontein Eye, a spring located to the north of Ezulwini on the banks of the Wonderfonteinspruit, will receive aquifer flow after approximately seven years, resulting in the affected water resources ultimately returning to close to their pre-mining state. From the comprehensive studies undertaken by EMC and its specialists, the risk of the failure of the underground boundary pillar and plugs between Ezulwini and the neighbouring mine, South Deep mine, have been considered extensively and the probability of these risks manifesting deemed remote.

25. On 12 October 2017, EMC, acting on the advice of its environmental consultants, applied for two authorisations to cease the pumping of water from the defunct underground workings at Ezulwini, namely:
 - 25.1 an application to the Regional Manager for an environmental authorisation in terms of section 24 of NEMA read with the Environmental Impact Assessment Regulations ("**EIA Regulations**") published in Government Notice R982 in *Government Gazette* 38282 of 4 December 2014, as amended ("**EMC's application for environmental authorisation**"); and

- 25.2 an application to the Provincial Head of the Department of Human Settlements, Water and Sanitation (“DWS”) for the amendment of its WUL in terms of section 50 of the NWA (**“EMC’s application for the amendment of its WUL”**).
26. In addition, and on 3 July 2018, EMC submitted an application to Regional Manager in terms of section 43(3) of the MPRDA for the partial closure certificate in respect of the closure of the underground workings at Ezulwini. A partial closure certificate was sought as certain surface operations are ongoing at Ezulwini as set out above. For the reasons set out below, this application was subsequently withdrawn on 9 April 2019.
27. EMC’s application for environmental authorisation was refused by the Regional Manager on 30 April 2018.
28. On 21 May 2018, Warburton Attorneys, acting on behalf of EMC, submitted an appeal against the Regional Manager’s decision, which appeal was upheld by the Environmental Minister on 6 March 2019, principally on the basis that there had been inadequate consultation by the Department of Mineral Resources and Energy (“DMR”) with, amongst others, the DWS, the Principal Inspector of Mines and the Council for Geoscience.
29. Unfortunately, as set out in more detail below, the Environmental Minister’s appeal decision has effectively put EMC back in the same position it was when it first submitted its application for environmental authorisation in October 2017, as the decision refers EMC’s application back to the Regional Manager for reconsideration following an additional public participation process. The Environmental Minister’s appeal decision provides no guidance to the Regional Manager as to whether EMC’s application ought to be granted or refused and it is likely, for the reasons set out below, that the Regional Manager’s

decision will again form the subject of an appeal and/or review launched either by EMC or a third party, such as Gold Fields.

30. EMC's application for the amendment of its WUL similarly remains pending, although the DWS has already expressed the preliminary view, in its comment on EMC's application for environmental authorisation, that it does not support the cessation of pumping of underground water at Ezulwini.
31. A significant amount of time has elapsed since EMC submitted the aforesaid applications for environmental authorisation and the amendment of its WUL. The fate of the resubmission of EMC's application for environmental authorisation to the Regional Manager is uncertain, which second decision by the Regional Manager will only be taken after the further consultation process as directed by the Environmental Minister's appeal decision (pursuant to EMC's successful appeal against the Regional Manager's initial refusal of its application for environmental authorisation). Therefore, EMC has taken legal advice as to the other remedies it may have in law in order to cease the pumping of underground water at Ezulwini.
32. This advice revealed that:
 - 32.1 an environmental authorisation in terms of NEMA and the EIA Regulations is not required as the proposed cessation of pumping does not constitute the activity contemplated by Activities 22 and 34 in Listing Notice 1 under EIA Regulations; and
 - 32.2 an amendment to EMC's WUL is not required in order for EMC to cease the pumping of water from the defunct underground workings as EMC's existing WUL constitutes a statutory

entitlement to pump underground water and does not create an obligation to pump such water.

33. Should it indeed be the case that an environmental authorisation and an amendment to the WUL are not required in order to cease the pumping of the water, as is submitted by EMC, then there would clearly be no purpose on EMC proceeding with the resubmission of its application for environmental authorisation or the amendment of its WUL and there would similarly be no purpose in the DMR or the DWS continuing to process such applications.
34. EMC has nevertheless proceeded with the resubmission of its application for environmental authorisation, as directed by the Environmental Minister's decision on EMC's successful appeal, and the amendment of its WUL because it does not wish to disregard the directives made by the Environment Minister and the Regional Manager pending the outcome of the present application.
35. The legal advice further revealed that even if an environmental authorisation and an amendment to EMC's WUL are required for EMC to cease the pumping of water from the underground workings at Ezulwini:
 - 35.1 in light of the prejudicial financial consequences, physical constraints and potential health and safety consequences of the continued pumping, as well as the findings of the extensive impact and risk assessment studies commissioned by EMC, EMC is entitled to cease the pumping of water from the defunct underground workings at the Ezulwini mine in the absence of such environmental authorisation or WUL amendment;
 - 35.2 alternatively, that GFI and GFO jointly and severally should be ordered either to cover the cost of pumping underground water

from Ezulwini or to contribute to such cost, as they are the principal beneficiaries of the continued pumping of the underground water.”

[5] The applicant then quite correctly states that this court has a discretion to grant a declaration of rights if the applicant is an interested party with an existing, future or contingent right. It states that what an applicant seeking declaratory relief is required to demonstrate is that some tangible and justifiable advantage will flow from the grant of the declarator or that the determination of the issue will affect its rights. It submitted that EMC had met these requirements. If neither an environmental authorisation nor an amendment to EMC’s water use license (“WUL”) are required for EMC to cease the pumping of water from the defunct underground workings at Ezulwini, there would be no need for EMC to proceed with its applications for such authorisation or amendment and there would similarly be no purpose in the DMR or the DWS continuing to process such application. In that event EMC would be entitled to cease pumping water from the underground workings at Ezulwini forthwith and without having to obtain authorisation from either the DMR or the DWS.

[6] I will deal in due course with all the relevant statutory and regulatory enactments but at this stage deem it convenient to refer to the following:

6.1 S24 of the Constitution of 1996 read with s7(2), 8(1) and s39(2) thereof. The last-mentioned deals with interpretation of legislation, which must promote the spirit, purport and objects of the Bill of Rights. Section 24 deals with Environment Rights;

6.2 The Mineral and Petroleum Resources Development Act 28 of 2002 (“MPRDA”);

6.3 The National Environmental Management Act 107 of 1998 (“NEMA”).

- 6.4 The MPRDA Regulations as published in GNR 527 in *Government Gazette* of 23 April 2004.
- 6.5 The 2014 Environmental Impact Assessment Regulations (“2014 EIA Regulations”);
- 6.6 The Environmental Impact Assessment Regulations Listing Notice 1 of 2014 published in *Government Gazette* No. 38282: Activity 22 and 34;
- 6.7 Regulations pertaining to the Financial Provision for Prospecting, Exploration, Mining or Production Operations (Government Gazette No. 39425);
- 6.8 The Mine Health and Safety Act No 29 of 1996;
- 6.9 The National Water Act No 36 of 1998.

[7] After applicant’s proceedings were issued, the 7th respondent filed its Notice of Intention to oppose and thereafter filed its answering affidavit in the main application. The fifth and sixth respondents (“South Deep”) similarly opposed the application and filed its answering affidavit in the main application together with a notice of counter-application and counter-application. This was obviously opposed by EMC. EMC also filed a Replying Affidavit to 7th Respondents’ answering affidavit as well as to South Deep’s Answering Affidavit. It also filed its Answering Affidavit to South Deep’s counter-application. The last mentioned then filed its replying affidavit in the counter-application together with a rejoinder in the main application. In June 2020 the First and Fourth Respondents (“the State”) filed their answering affidavit in the main application as did the second and third respondents. In July 2020 EMC filed its replying affidavit to those answering affidavits.

- [8] As far as the counter-application by Gold Fields is concerned the Acting Deputy Judge President ordered that it would be heard and decided first, and the case was set down for a hearing on 3 and 4 December 2020. The record ultimately comprised over 3000 pages and I was also furnished with detailed heads of argument. The issue to be decided is only an interpretative one and I accordingly decided that it could be most conveniently decided on the papers. In a very useful joint practice note the parties identified the pages and paragraphs that I ought to read, and this made my task less onerous. For present purposes no factual disputes need to be decided.
- [9] Before I deal with the counter-application, a number of facts and submissions emanating from EMC's Founding Affidavit deserve repetition:
- 9.1 In May 2014 EMC acquired the underground and surface operations of the Ezulwini Mine;
 - 9.2 In September 2016 EMC ceased underground mining operations, but surface related mining operations are however ongoing;
 - 9.3 Groundwater had been pumped in order to undertake the underground mining operations which resulted in the dewatering of a dolomitic compartment. Such dewatering took place pursuant to permits issued to EMC's predecessors in terms of the now repealed Water Act 54 of 1956 and in terms of a water use licence ("WUL") issued to EMC in 2015 in terms of the NWA;
 - 9.4 Notwithstanding the cessation of underground operations, EMC continues to pump and treat the water from the underground workings at a cost of some R21 million per month;
 - 9.5 Service surface operations are continuing at Ezulwini, the provisions of s43 (3)(b) of the MPRDA are not applicable to the proposed cessation

of pumping from the underground workings. This subsection (so it was put) requires the cessation of the mining operations in their entirety.

- 9.6 An amendment to EMC's WUL is not necessary as such does not require (I underline) EMC to pump underground water. It merely permits it to do so. No obligation is created to pump such water.

[10] GOLD FIELDS COUNTER APPLICATION:

In the "notice of counter application" dated 23 September 2019 it was stated that the following relief would be sought:

1. Declaring that the Applicant remains responsible for the pumping and treatment of extraneous water from the underground workings of the Ezulwini mine until at least when the DMR Minister has issued a closure certificate in terms of section 43 of the Mineral and Petroleum Resources Development Act 28 of 2002 ("MPRDA") to the Applicant or such longer period as contemplated in section 24R of the National Environmental Management Act ("NEMA").
2. Directing the Applicant 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 the Applicant 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.
4. In the event of any party opposing the relief sought in this application, ordering such party to pay the costs of this application, if there is more than one of them, ordering them to pay the costs jointly and severally, the one paying the other to be absolved.

[11] As a consequence of the above EMC, Gold Fields and the 7th respondent have described the issues to be decided. The 2nd respondent has also filed heads of argument and supports the granting of prayer 1 of the Gold Fields application. The other state respondents in their answering affidavit also support the main relief sought by Gold Fields.

[12] ISSUES TO BE ARGUED BY GOLD FIELDS (also referred to as "South Deep"):

I am referring to the summary provided in the joint practice note. South Deep and EMC are neighbouring mines in the Far West Rand Gold Fields, situated below a dolomitic compartment holding a massive volume of water (there is a comment in the affidavits to the effect that "it is like mining beneath the Vaal Dam"). EMC's objective is to seek clarity in respect of the application of particular legal provisions to the cessation of pumping water from its underground workings which would have the effect of re-watering the Ezulwini mine and the dolomitic aquifer. South Deep contends that upon a proper interpretation of s43 of the MPRDA, in view of its historical context, wording and statutory context, the aim of the section is to regulate the cessation of pumping. To this end, s43(1) provides that the holder of a mining right remains responsible for the pumping and treatment of extraneous water until the Minister has issued a closure certificate in terms of the Act to the holder. It thus seeks to preserve the status quo until the required information, programmes, plans and reports prescribed by MPRDA and NEMA regulations have been submitted to the regulator in terms of section 43 (4), have been considered, and the Chief Inspector of Mines and each government charged with the administration of a relevant law have confirmed in writing inter alia that the purposes and treatment of extraneous water has been addressed and a closure certificate been issued. Section 24R of NEMA has substantially the same purpose. South Deep submits that where EMC has pumped and is still pumping extraneous water from its mine workings and a closure certificate has not been issued to it, it is responsible to continue pumping the extraneous

water at least until it has followed the process envisaged in s43 read with the regulations and a closure certificate has been issued.

[13] ISSUES TO BE ARGUED BY EZULWINI (EMC):

EMC raises 2 defences in its answering affidavit. The first is that South Deep misinterprets s43 of the MPRDA and s24R of NEMA. It says that neither of these two sections imposes liability for the pumping and treatment of polluted or extraneous water but rather confirm that where such liability exists, it remains with the holder of the relevant right until a closure certificate has been issued (in the case of NEMA) and even after a closure certificate has been issued (in the case of NEMA). The source of such liability is not section 43 of the MPRDA. To the extent that such liability exists it arises from other statutory provisions, including provisions which prescribe the content of an EMPR of closure plans. EMC's second defence is that the obligation to pump only applies to extraneous water for purposes of s43 of MPRDA and "polluted and extraneous water" for purposes of s24(3) of the NEMA and that "as it originates from a single dolomitic ground water compartment... (it) accordingly does not enter the mine "from elsewhere" and is not "polluted".

[14] The seventh respondent supports South Deep's interpretation of s43 of the MPRDA and 24R of NEMA.

[15] Before I continue with the detailed argument of the parties as contained in their respective heads of argument, which I will attempt to summarise, it is convenient for the sake of clarity to refer to a specific issue. In par 66 of "applicant's heads of argument in response to fifth and sixth respondents' counter application", the following was said:

"In conclusion, it is respectfully submitted that on a proper interpretation, sections 43(1) of the MPRDA and section 24R(1) of NEMA do not create obligations on the part of a holder of a mining right to pump and treat extraneous water. Their effect is instead to prolong an existing obligation to do

so. Because of the view that Gold Fields has taken regarding the proper interpretation of these sections, it has failed to allege and prove a pre-existing obligation on the part of EMC to pump and extraneous water from the underground workings of the Ezulwini mine.”

[16] This submission prompted me to direct a written question to EMC’s attorneys as follows: “does EMC say there is no obligation, and if so, as I presume it will, exactly why not?” I received a prompt reply in writing on 24/11/20 and the following was said:

- “2.1 The points EMC makes are two-fold. Firstly, that it is not Gold Field’s case that there is, apart from s43(1) of the MPRDA and section 24R(1) of NEMA, an anterior independent obligation to pump extraneous water. Whether or not Gold Fields are correct in their interpretation of those sections is a matter of argument. Secondly, EMC says that there is as a fact no independent obligation to pump extraneous water and accordingly sections 43(1) and 24R(1) do not impose such an obligation on EMC.
- 2.2 EMC contends that it pumped extraneous water not because it was obliged to do so, but because it needed to do so in order to conduct underground mining operations. Therefore, the mere fact that it pumped water is not evidence of the existence of an obligation to pump. Apart from noting that Gold Field’s cannot point to an obligation to pump water aliunde its interpretation of s43(1) and 24R(1), EMC cannot prove the absence of an independent obligation to pump. This is a matter upon which Gold Fields bears the onus.
- 2.3 ...
- 2.4 It is common cause that EMC has ceased its underground mining operations: It continues to conduct surface mining operations and consequently it continues to carry on mining operations for the purposes of the MPRDA.”

- [17] I note also that EMC states in its founding affidavit that its WUL constitutes a statutory permission or entitlement to pump a certain quantity of underground water from a particular aquifer situated below specified properties in order to facilitate underground mining operations. It does not create an obligation to pump water. It is also said that since surface operations are continuing at Ezulwini, S43(3)(b) of the MPRDA is also not applicable to the proposed cessation of pumping from the underground workings. This subsection requires the cessation of the mining operations in their entirety.
- [18] The above in essence encapsulates EDM's argument but I will again refer to its written argument in more detail.
- [19] Before I deal with Goldfield's submission a reference to certain statutory provisions that have been referred to is appropriate:

19.1 Section 43(1) of the MPRDA reads as follows:

"The holder of a ... mining right... 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... concerned" (I underline).

19.2 Section 24R (1) and (2) of NEMA provides that:

"(1) Every holder, holder of an old order right and owner of works remains responsible for any environmental liability, pollution or ecological degradation, the pumping and treatment of polluted or 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 Mineral and Petroleum Resources Development Act 2002, to the holder or owner concerned (I underline).

(2) When the Minister responsible for mineral resources issues a closure certificate, he or she must return such portion of the financial provisions 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, including the pumping of polluted or extraneous water for a prescribed period after issuing a closure certificate. “

[20] GOLDFIELDS HEADS OF ARGUMENT RE PRAYER 1 OF THE COUNTER APPLICATION

Before I deal with certain specific arguments. It is necessary to refer to the legal framework for statutory interpretation, as counsel for the second respondent in the main application did, and counsel for EMC as well. The former referred Natal Joint Municipality Pension Fund v Endumeni Municipality 2012 (4) SA 593 (SCA), where the relevant principles were clearly re-stated and which were endorsed by the Constitutional Court in a number of cases including Democratic Alliance v African National Congress and Another 2015 (2) SA 232 (CC) at par [136], and Cool Ideas 1186 CC v Hubbard and Another 2014 (4) SA 474 (CC) at par [28].

The following was said in the last mentioned case:

“[28] A fundamental tenet of statutory interpretation is that the words in a statute must be given their ordinary grammatical meaning, unless to do so would result in an absurdity. There are three important interrelated riders to this general principle, namely:

(a) that statutory provisions should always be interpreted purposively;

(b) the relevant statutory provision must be properly contextualised;
and

(c) all statutes must be construed consistently with the Constitution...”

- [21] It is clear from the decisions that the entire enactment in which the particular words appear must be considered. Context remains important even where the words to be considered are clear and unambiguous. Words must therefore not be “peered at” in isolation.

See: Department of Land Affairs and Others v Goedgelegen Tropical Fruits (Pty) Ltd 2007 (6) SA 199 (CC) [51] fn 48.

I therefore do not agree that the words that I underlined in the statutes referred to in par 19.1 and 19.2 above, standing alone, provides the answer to the main issue between the parties. The interpretation of those sections, and those specific words must be considered within the context of the relevant legal framework and of course keeping in mind s24 of the Constitution read with s39(2) thereof.

[22] THE HISTORICAL CONTEXT OF S43

South Deep (Goldfields) describes this fairly concisely. The underground works of various gold mines in the West Rand and Far West Rand area are situated below dolomitic compartments holding a massive volume of water. The current mines are situated below the Gemsbokfontein Dolomitic Compartment which is some 9000 hectares in extent. The water stored in these permeates through faults and cracks and flows into the mine some 200 to 800 metres below these compartments. The flow is at an enormous rate and will rapidly fill the mining area if it is not pumped out. Pumping is thus a necessity in order to mine. Both the 1956 Water Act and the 1998 Water Act provides for a permit and license respectfully to remove such water. These gold mines have been de-watered over decades. The de-watering disturbs the natural balance. The legislative, as indicated in the MPRDA and NEMA is aware of these activities and mentions them expressly in s43 of the MPRDA and s24R of NEMA as well as in various Regulations. Its aim in these sections and enactments is to regulate cessation of pumping. The consequences of such and the resultant re-watering must be considered carefully and set out in reports that must be submitted to the regulator, and that pumping may only cease once the reports are approved and a closure certificate has been

issued. (See: s43 of MPRDA read with Regulations 56-62; s24R of NEMA read with the EIA Regulations including reg. 19(6) and appendix 5). Regulation 19 deals with the submission of basic assessment report and environmental management programme, and where applicable a closure plan, to competent authority. Appendix 5 deals with the content of a closure plan. "Pumping and treatment of extraneous water or ecological degradation as a result of closure is mentioned specifically in clause 1(h) of appendix 5.

- [23] I have quoted sections 43(1) and 24R(1) and (2) above. The legislature lists a number of matters in these sections for which the holder of a mining right remains responsible until a closure certificate is issued, or even longer. It is clear, according to this argument, that the legislature mentions pumping and treatment of extraneous water expressly and separately from environmental liabilities and conditions of the EMP. What is contemplated is that where pumping was in fact being conducted in order to mine, the holder of the mining right remains responsible for pumping and treatment of water until a closure certificate issued, in order to maintain the status quo until such time as the cessation of pumping can be properly regulated.

[24]

24.1 THE STRUCTURE OF S43:

Section 43 (3) provides for the instances when a closure certificate must be applied for such application is necessary, amongst others, upon the cessation of the prospecting or mining operation. Section 43 (4) in turn provides that a closure application must be accompanied by the required information, programmes, plans and reports prescribed in terms of the MPRDA and in terms of NEMA. It is clear that the legislature had a particular process in mind before pumping can cease.

24.2 REGULATIONS UNDER THE MPRDA:

24.2.1 Regulation 57 prescribes the application and documentation required including the environmental risk report and closure plan.

24.2.2 Regulation 60 deals with the environmental risk report.

24.2.3 Regulation 62 prescribes the contents of the closure plan that has to accompany the closure application.

24.3 REGULATIONS UNDER NEMA:

24.3.1 I have already referred to appendix 5 of the EIA Regulations.

24.3.2 The Financial Regulations 2015 promulgated under NEMA requires provision for inter-alia the costs associated with final closure in a final rehabilitation, decommissioning and closure plan inclusive of the costs associated with remediation of latent or residual impacts which “may become known in the future including pumping or treatment of polluted or extraneous water”, as reflected in an environmental risk assessment report.

24.3.3 “Financial provisions” is defined in s1 of NEMA by reference to inter alia the pumping and treatment of polluted or extraneous water.

[25] Section 43(5) provides that no closure certificate may be issued unless the Chief Inspector of mines and each government department charged with the administration of any relevant law have confirmed that the provisions pertaining inter alia “the pumping and treatment of extraneous water” and “compliance to the conditions of the environmental authorisation” have been addressed.

[26] GOLDFIELDS CONCLUSION ON THE INTERPRETATION OF SECTION 43(1) AND 24R(1)

EMC falls squarely under section 43(1) of the MPRDA and section 24R(1) of NEMA. It is common cause that EMC is the holder of a mining right in respect of Ezulwini. It is common cause that EMC pumped groundwater from the underground workings and still continues to do so. There is no dispute about what water is being pumped and where the water emanates from but EMC denies that it can be described as “extraneous”. It is common cause that no closure certificate has been issued.

[27] THE LEGISLATIVE HISTORY OF SECTIONS 43(1) (OF MPRDA) AND 24R (OF NEMA), AS DESCRIBED BY APPLICANT (EMC):

27.1 The MPRDA commenced on 1 May 2004. Section 43(1) read that “the holder of a ... mining right ... remains responsible for any environmental liability, pollution or ecological degradation, and the management thereof, until the minister has issued a closure certificate to the holder concerned.” Section 43(3) deals with the circumstances when a closure certificate must be applied for. This includes the cessation of the prospecting or mining operation. At that time in 2004 the environmental impacts of mining were regulated exclusively through the MPRDA and in particular through the requirement under that Act to obtain an Environmental Management Programme (“EMP”) prior to commencing mining and to ensure that mining takes place in accordance with such approved EMP. An EMP was required to identify and describe measures for the impacts arising not only during the course of the mining operation but also thereafter. (See: GN 527 in GG 26275 of 23 April 2004).

27.2 In terms of the MPRD Regulations, an EMP was required to include action plans to achieve the said objections and goals (MPRD Regulation 51(b)(iii). An EMP was also required to include a closure plan as contemplated in s43(3)(d) of the MPRDA. Amongst others, such plan had to include a description of the methods of decommissioning each mining component and the mitigation or management strategy proposed to avoid, minimise and manage residual or latent impacts (reg 62(f)).

27.3 The said Regulations further prescribed the quantum of financial provision an applicant for a mining right was required to make for the rehabilitation or management of negative impacts. This included provision for the actual costs required for, inter alia, the decommissioning and final closure of the mining operating and post closure management and latent impacts (Reg 54 (b) and (c)).

27.4 Regulation 55(8)(c) provided for a final performance assessment when the holder of a mining right intended closing a mining operation.

27.5 The principles for mine closure were prescribed in MPRD Regulation 56. It is clear that environmental concerns and impacts played a major role. These had to be addressed in the relevant EMP. The commitments made in the EMP created legal and enforceable obligations on the holder of a mining right.

27.6 It was therefore contended by EMC where mining operation involved the pumping of underground water and the cessation of such operations involved, either the continuation of such pumping or the cessation thereof, provision for any environmental impacts had to be contained in the relevant EMP and closure plan and financial provision would have to be made thereunder.

[28] On 8 December 2014 the legislative framework changed with the introduction of the "One Environmental System." Giving effect to this system envisaged the removal of all the provisions in the MPRDA that dealt specifically with environmental authorisation and management and the inclusion of such provisions in the NEMA. This system was accordingly implemented through a number of legislative amendments including the MPRDA Amendment Act 49 of 2008 ("MPRDA A.A 2008"), the National Environmental Management Laws Second Amendment Act 30 of 2013 and the National Environmental Management Laws Amendment Act 25 of 2014.

[29] The following amendments introduced as part of “One Environmental System” are relevant for present purposes:

29.1 Sections 38-42 of the MPRDA were repealed. They dealt primarily with the environmental regulation of mining;

29.2 The requirement to obtain an approved EMP was replaced with a requirement to obtain an Environmental Authorisation in terms of NEMA. These would contain the obligations of a mining right holder. Prior to that an applicant was required to compile a scoping and environmental impact assessment report, an EMP and a closure plan.

29.3 The provisions for financial provision for remediation were removed for MPRDA (s41) and replaced by a new s 24P in NEMA containing substantially similar provisions.

29.4 The regulations in the MPRDA dealing with financial provisions were also repealed and replaced by new such Regulations published in terms of NEMA. The management of latent and residual environmental impacts which may be known in the future were now expressly defined to include “the pumping and treatment of polluted or extraneous water” (It was contended that this amendment did not extend the reach of the section).

29.5 Section 43(1) of the MPRDA was amended and now reads as quoted in par 19.1 above. Section 43 (4) deals with an application for a closure certificate. Section 43 (5) prohibits the issuing of such unless environmental issues have been addressed which now includes “the pumping and treatment of extraneous water.”

29.6 Financial provisions for future negative environmental impacts are dealt with in s 43 (6).

29.7 Procedures and requirements on mine closure as it relates to the compliance of the conditions of an environmental authorisation are now prescribed in terms of the National Environmental Management Act 1998.

29.8 A new section 24R, dealing with mine closure and environmental authorisation was inserted into NEMA in terms of s8 of the NEMA Amendment Act 2008. Section 24R(1) and (2) reads as quoted in par 19.2 above.

[30] EMC's ARGUMENT

It is at this stage convenient to state what EMC's submissions are having regard to the mentioned amendments. It was said that the objections and the legislative measures for the mitigation and management of the environmental impacts of mining operations at- and post closure have not changed. The fact that there is now express reference to the pumping and treatment of extraneous water in the MPRDA and to the pumping and treatment of polluted or extraneous water in NEMA has not changed the scope of the obligations on the holder of the right.

[31] In order to determine EMC's obligations in regard to the pumping and treatment of water from the underground workings, regard must be had to its existing EMP, which was approved in March 2015. This EMP contemplates 2 options for the closure of the underground workings. The first is the cessation of pumping, which the EMP states will result in a rise in the water table in the particular dolomitic Aquifer, and the second is that the pumping infrastructure could be maintained by South Deep Mine and pumping would continue. In either scenario, the EMP does not contemplate EMC remaining responsible for the pumping and treatment of water from the particular underground workings in perpetuity.

[32] As far as the purpose of s43 of the MPRDA and s24R of NEMA is concerned, both dealt with a remaining or continuing obligation until the Minister has

issued a closure certificate. Both sections are accordingly concerned with the perpetuation of an existing obligation to pump and treat extraneous water and polluted water, and not the creation of a new obligation to pump and treat such water. I have already referred to this defence to the counter-claim in par 16 above.

- [33] As far as the literal interpretation of the meaning of the word “remain” and “remains”, “responsible: is concerned, both parties have understood the word “responsible: to refer to a legal obligation. The word “remain” is defined in the New Oxford Dictionary of English as meaning “continue to exist”. The use of the word “remains” and “remain” in the sections therefore requires that the relevant obligation to pump and treat extraneous water must exist independently from the sections in question, in other words, a prior legal obligation must have existed. Both sections are concerned with the perpetuation of an existing obligation and not the creation of a new one. In addition it was submitted that the obligations on the holder of a mining right in regard to environmental liability, pollution and ecological degradation arise in numerous other provisions in NEMA and other legislation (See for example s28 of NEMA, s19 of the National Water Act of s43A of Act 59 of 2008). Neither s43(1) nor section 24R(1) are the source of these obligations. Responsibility for the management and sustainable closure of a mining operation also does not arise from these sections. This appears expressly from s43(8) of the MPRDA of s24R(3) of NEMA, so it was contended.
- [34] EMC also emphasise that the interpretation of a legislative provision is an objective process. An interpretation cannot be based upon the facts or circumstances peculiar to an entity to which the provision applies. It is alleged that Gold Fields has wrongly adopted the latter approach. Gold Fields has however failed to prove a pre-existing obligation on the part of EMC to pump and treat extraneous water.
- [35] As for a prayer 2 of the counter application was concerned it was submitted that no case has been made out for such interdictory relief. The same applies

to prayer 3. EMC noted, in the former case that it addressed an email to Gold Fields on 8 August 2019, in which it confirmed that “the mitigation and remedial measures instituted to ensure the safety of our employees and contractors, to secure the shaft infrastructure and to allow for the continuation of pumping activities in the interim remain on-going.” This assurance was not challenged by Gold Fields. As for a prayer 3 is concerned, EMC refers to written updates provided to Gold Fields on four occasions between May and November 2019. These updates provided sufficient insight as to the shaft infrastructure and condition of the shaft and the progress EMC had made in securing the shaft and associated infrastructure so as to keep Gold Fields fully appraised of the relevant facts.

[36] In both instances Gold Fields has not established that it has a clear or even prima right to the relief sought nor has it demonstrated a reasonable apprehension of any harm should the relief not be granted.

[37] I agree with the submissions made by EMC in this regard. There is no basis laid for the granting of the interdictory relief sought in prayers 2 and 3 of the counter-application.

[38] GOLD FIELDS RESPONSE TO EMC’s DEFENCE IN RESPECT OF PRAYER 1:

38.1 Firstly, it is argued that EMC misinterprets the said section 43 and 24R by saying that they only confirm that where a previous liability to pump exists, it remains with the holder until a closure certificate has been issued or even thereafter. This interpretation does not accord with the content and structure of these sections. On EMC’s interpretation any holder can effectively stop pumping whenever it chooses to do so. This renders the whole scheme devised by the legislative for purposes of orderly closure redundant. Section 43 does not refer to the cessation of pumping of extraneous water within the context of an existing EMP but mentions it by name in addition to existing EMP conditions. Section 43 creates a liability and imposes a duty to continue pumping (where pumping has occurred) until a closure certificate has been issued. The

closure plan which needs to be submitted with the closure application must deal inter alia with the pumping of extraneous water and the management thereof (see appendix 5 to the EIA regulations). Furthermore, in terms of s43(5), no closure certificate may be issued unless the Chief Inspector and each relevant government department have confirmed in writing that the provisions to inter alia the pumping and treatment of extraneous water have been addressed. EMC's argument that some other "obligation: is required, will negate the provisions of section 43(1) and (5).

38.2 EMC's second defence is that the obligation to pump only applies to "extraneous water" for purposes of the 2 particular sections, and that "as it originates from a single dolomitic groundwater compartment... it accordingly does not enter the mine from elsewhere. However, there is no dispute between the parties about what water is being pumped and where it comes from. Gold Fields explained the geology in the first part of its answering/founding affidavit. These facts are admitted in EMC's replying affidavit subject to a few qualifications which are not relevant. It is also common cause that the water which enters the underground workings comes from the dolomitic aquifer above the mine. Water permeates into the workings of the mine through faults and cracks of the "floor" of the dolomitic compartment. This compartment is above and outside the mine ie. extraneous. EMC describes the water that "infiltrates" the Ezulwini shaft as "fissure water". A fissure is indeed a crack or deft in the bottom of the floor of the dolomitic compartment from which the water comes. There is therefore no merit in this second defence.

[39] SECOND RESPONDENT ARGUMENT:

39.1 It is contended that the issue before me is of national importance and should the unambiguous wording of the particular sections not be

correctly interpreted, it may have alarming consequences for mining in general and detrimental consequences for the environment.

39.2 The relevant sections apply to all holders of a mining right. The specific statutory obligations emanate by virtue of s43(1) itself. There exists no ambiguity.

39.3 EMC's stance is that for the first time in the history of South African mining, a "defunct mine", as EMC refers to its Ezulwini Mine, should be allowed to completely re-water the dolomitic groundwater compartment of the mine void that was created during the mining operation. It argues that it is entitled to do so without any assessment of potential impacts and without any authorisation to mitigate and manage the environmental impacts.

39.4 This would negate the provisions of s43 and s34R, which must be interpreted in a much wider and polycentric context than contended for by EMC.

39.5 The case advanced by EMC is merely a self-serving interpretation of the mentioned sections.

39.6 EMC's reliance on the word "remain" is furthermore misplaced. The words "remain responsible" related to the duration of the periods referred to s43(1) of the MPRDA and in s24R of the NEMA. In my view this argument is sound and I agree with it. Neither of the sections contemplates an existing obligation emanating from a source other than the said specific statutory provisions to pump and treat extraneous water, as EMC argues. These provisions itself impose a statutory obligation. In my view, I may add at this stage, the words "remains responsible" in s43(1) must be read together with the word "until". In other words, a time period is contemplated, and not a pre-existing obligation emanating from some other source.

39.7 It was also submitted that the statutory obligation to “remain responsible” may also be regarded as a blanket reservation of an obligation to prevent any environmental liability, inclusive of pollution, ecological degradation, and to pump and treat extraneous water. The statutory obligation imposed by s43(1) remains and exists by virtue of a being a holder of a mining right. The word “until” indicates as I have said, a reference to a time period, and thus read with the word “remains”, it refers to the continuation of the existence of the statutory obligation to be responsible for a period of time, and not to any pre-existing obligation.

- [40] Counsel for the second respondent also referred to the applicable legal framework, including reference to the said environmental rights contained in s24 of the Constitution, to which EMC does not refer at all as and did to the interpretation of the relevant statutory provisions.
- [41] It is also clear, as also appears in s43(1) that s24R(1) of the NEMA similarly refers to a prescribed period.
- [42] I have already referred to item 1(h) of appendix 5 to the 2014 Regulations, which in peremptory terms requires a closure plan to include the process for managing any environmental damage, pollution, pumping and treatment of extraneous water, or ecological degradation as a result of closure. In addition, Listing Notice 1 to the 2014 EIA Regulations (published in GNR 983 in GG of 4 December 2014) at item 3(1) therefore, identifies the activities listed in appendix 1 in terms of s24 (2)(a) of the NEMA, as activities that may not commence without an environmental authorisation from the competent authority. The taking out of service, such as the complete re-watering of the underground mine area of a defunct mine, constitutes the decommissioning of an activity which then triggers listed activity 22 of the EIA Regulations 2014, requiring a closure certificate in terms of s43 MPRDA.
- [43] An additional consideration are the principles set out in s2 of the NEMA, which are incorporated in s37 of the MPRDA. They apply to all mining operations

and any matter or activity relating to such operation, and to serve as guidelines for the interpretation, administration and implementation of the environmental requirements of the MPRDA. Section 37(2) is an all-enhancing provision and refers to the general environmental management principles, about by way of summary, which principles apply to all mining operations (s37(1)(a).

- [44] With the onset of the “One Environmental System” s24N(7)(f) of the NEMA introduced a general responsibility on the holder of a mining right for any environmental damage, pollution, pumping and treatment of polluted or extraneous water, or ecological degradation as the result of operations. I agree that this may be regarded as a further source of the statutory obligation of the holder of a mining right to remain responsible for any environmental impacts, including the pumping and treatment of polluted or extraneous water.

- [45] It is also noteworthy that s43(1) of the MPRDA, which was retained, imposes responsibility on various holders of rights, despite the fact that all of them may not necessarily have an environmental management programme. The holder of an old order mining right, or the previous owner of the works that have ceased to exist, are given as examples. This is a further indication that the obligation to remain responsible for the pumping of water cannot always be sourced in an environmental management programme, as EMC alleges. Counsel for second respondent therefore contended that this argument of EMC was fatally flawed. He also emphasised the importance of s43(3) and 43(5) of the MPRDA relating both addressing the cessation of activities and the peremptory requirements in relation thereto.

- [46] The MPRDA Regulations also place specific obligations of the holder of a mining right to ensure that risks pertaining to environmental impacts be quantified and managed pre-activity and that possible latent environmental impacts are identified (Reg 56). Regulation 57 deals with a closure plan, an environmental risk report. Regulation 62 deals with a prescribed closure plan. I cannot imagine that the general provisions on impact assessment under the NEMA, would not require an assessment of water related aspects. The conclusion was that should the holder of a mining right propose the cessation

of the pumping and treatment of polluted or extraneous water, it has the statutory obligation to start the required environmental impact assessment of the proposed activity, and to address the identified potential impacts thereof in proposed mitigation measures to avoid, minimise or limit the potential impacts of that proposed activity. I agree that that is part of the mosaic envisaged by the “One Environmental System.”

[47] SEVENTH RESPONDENTS’ ARGUMENT:

47.1 Lucky farms is a vegetable farming operation comprising two farms, one north and one south of EMC’s mine. It gave details of its dependency upon water from a spruit, into which EMC currently discharges water from its mine. The envisaged negative impact upon its farming activities are disputed by EMC in its replying affidavit in the main application. These disputes are not relevant to the counter-application. It supports the argument relating to the importance of the provisions of s24 read with s39(2) thereof, in the context of the interpretive exercise that needs to be undertaken.

47.2 It referred to Fuel Retailers Ass. Of Southern Africa v D-G, Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province 2007 (6) SA 4 (CC) at par [67], wherein the court indicated that the NEMA principles must be observed, stating that such interpretation and implementation not only of NEMA, but any other legislation that is concerned with the protection and management of the environment.

46.1 Reference was also made by counsel to s4(1) of the MPRDA which states that “when interpreting a provision of this Act, any reasonable interpretation which is consistent with the objects of this Act must be preferred over any other interpretation which is inconsistent with such objects”. Section 1(3) of NEMA contains a similar provision, as does s1(3) of the National Water Act.

46.2 Counsel submitted, with reference to the purpose, objects and principles of MPRDA and the NEMA, that the interpretation by South Deep of the relevant sections, is in accordance with the risk adverse and cautious approach, and the preventative anticipating approach per section 2(4)(a)(vii) and (viii) of NEMA. He submitted that EMC's interpretation of the relevant sections is not supported by the purpose and objects of either NEMA or the MPRDA. I agree. The relevant sections, and especially s43(1) and s24R, that I have referred to above, in themselves do not support the interpretation contended for by EMC.

[48] FIFTH AND SIXTH RESPONDENTS ARGUMENT IN REPLY:

Their heads to a large extent deals with the interpretation exercise that must be undertaken having regard to the mosaic on a whole that I have referred to already. Counsel however also emphasizes the plain language of s43(1) and 24R(1). I agree that the plain words of s43(1) are compatible with all of the following constructions:

48.1 the holder remains responsible for pumping where it has in fact been pumping;

48.2 the holder remains responsible for pumping where it had an obligation in terms of the legislation to pump;

48.3 the holder remains responsible for pumping where it had an obligation de hors the legislation to pump.

[49] I have dealt with the relevant principles relating to the interpretation of statutes. I agree that interpretation is a matter of law. There can be no question of an onus resting on a particular litigant. I also agree that it is not necessary to allege and prove that Gold Fields had an antecedent obligation to pump. No delict is relied up but a current statutory obligation and responsibility as per the said s43 and 24R, in circumstances where EMC has been pumping for

years and where section 24N(7) has since its inception placed a responsibility to pump extraneous water on the holder of a mining right, as a matter of law. This section of Act 107 of 1998 deals with “Environmental Programme” and in sub-section (7) deals with a holder’s (of an environmental authorities) obligations in general but also in specific terms to deal comprehensively with environmental concerns and impacts. I have also already referred to sub-section 7(f), substituted in 2014, that reads that such a holder “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”. This section is clear.

- [50] It must be added that amongst the new sections inserted into NEMA with effect from 2014, is section 24N which deals with the environmental programme (‘EMP’) which must be required before considering an application for environmental authorisation in the case of mining. The EMP under s24N of NEMA is not the same as the EMP under the MPRDA. Under the pre-amended MPRDA, an approved EMP constituted the environmental approval. Under NEMA, the EMP is only the management programme which forms part of the EPA, and its content is prescribed by NEMA and its regulations. I have referred to s21N(7)(f). This means that the relevant holder is responsible for pumping and treatment of extraneous or polluted water which is required as a result of its operations. The amended s43(1) of the MPRDA provides expressly for the period after cessation but before a closure certificate is issued. I have already stated my view that the words “remains responsible” must be read with the “until”. In other words, a period of time is envisaged, and not a pre-existing obligation. Section 24R(1) of NEMA provides for the period after the closure certificate as has already been pointed out. The new section 24P(5) of NEMA expressly provides that the Minister may retain such portion of the financial provision as may be required to rehabilitate the closed mining operation in respect of latent, residual and other environmental impacts including the pumping of polluted or extraneous water, for a prescribed period. Section 24R(2) of NEMA contains a similar provision. All these sections must in my

view be read together. The language is plain and clear, and so is their purpose. I agree that the environmental responsibilities set out in sections 24N(7)(f), 43(1) and 24R(1) thus exist in addition to those set out in the relevant EMP and that such EMP does not contain the sum total of all environmental liabilities, duties or responsibilities. A contrary view would negate the clear language of these provisions and their purpose in the context of the overall statutory scheme introduced in 2014.

- [51] Further written arguments by EMC in reply to the Gold Fields submissions and the 7th respondent were submitted. I have studied these. As far as the former is concerned EMC emphasizes that the counter-application must be accepted as setting out which legislative provisions are relied upon. This, so it is alleged, narrows the scope of prayer 1 to the proper interpretation of NEMA, and to a lesser extent the interpretation of s2 of the Mine, Health and Safety Act 1996. No mention is made of the constitutional provisions or the mosaic that I have referred to, and that the legislature clearly intended. I will not repeat EMC's argument relating to the particular interpretative exercise. This has been sufficiently dealt with. The principles of interpretation were again set out. Again, this is nothing new. The legislative listing of the relevant sections was again referred to. I have dealt with that. The purpose of the sections was set out. That topic has been dealt with too. Submissions in relation to prayers 2 and 3 were repeated. As I have said I do not intend to grant those prayers for the reasons already given.
- [52] Regarding the response to the second and seventh respondent's heads of argument, it was argued that unlike Gold Fields, whose heads in reply "appear to concede" that the source of responsibility for the pumping of polluted extraneous water referred to in s43(1) of the MPRDA and s24R(1) of the NEMA does not arise in these sections themselves, the second respondent insists that the obligation arise by virtue of the statutory provisions themselves and because EMC is the holder of mining right. According to the Minister there is no ambiguity in these sections and they require no in-depth interpretation. This view is over-simplistic, so it is said and the heads overlook the specific

wording of the section and in particular misinterpret the words “remains responsible”. I do not intend to repeat those arguments again. They have been sufficiently dealt with. I have considered the working of the sections themselves against the overall mosaic that I have described on background and guide-line. Again, nothing is said of the relevant Constitutional provisions that inform the whole process of the required interpretation exercise. As far as the argument of the seventh respondent is concerned there are certain factual disputes which cannot be decided in these proceedings. EMC however repeats its contention with which I do not agree, that the water originates from a single dolomitic compartment and is accordingly not extraneous origin.

- [53] Applicant also filed heads of argument in response to the fifth and sixth respondents’ heads of argument in reply. It criticizes Gold Fields for introducing a new case by contending for the first time that the source of the obligation to pump water may be found in section 24N(7)(f) and 24P(5). This argument is not foreshadowed in the notice of motion or the counter-application. Apart from being wrong in any event, Gold Fields should not be permitted to make out a new case in replying heads of argument. I do not agree that a “new cause of action” in reply was sought to be established. The cause of action remained as it was, namely that the applicant “remain responsible” for a certain period. A party is quite entitled to refer to the total picture in the sense of properly contextualising the relevant statutory provisions. Cool Heath *supra* at par [28] is clear on this point as is Endumeni. This exercise does not mean that each and every section of the relevant legislation or amendments thereto in 2014 must be referred to in the prayer sought. At all times the central question was: what is the meaning of the word “remains” in the given context looked at holistically and against the back-drop read with s39 (2) of the Constitution, a topic that has been studiously avoided by EMC.
- [54] In my opinion EMC’s view is too narrow. The mentioned riders to the general principles of interpretation referred to in par [28] of Cool heads were in my view not adequately considered. Even if they were however, the central

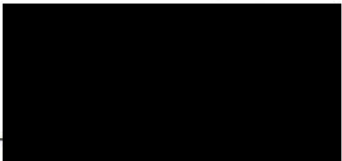
question that I have referred to in the previous paragraph remains, and it has been answered and fully addressed and debated. I have given my comments and opinions on certain topics and submissions as the narrative developed and I do not need to repeat them again. In my opinion EMC's interpretation of s43(1) and the meaning of "remains responsible" cannot be supported by the plain language of the section, nor in the proper context of all the relevant legislation nor having regard to the purpose of the "One Environmental System" introduced in 2014.

[55] The result therefore is the following:

55.1 Prayer 1 of the Counter-Application of the 5th and 6th Respondents is granted.

55.2 Prayers 2 and 3 are dismissed.

[56] In my view the applicants in the counter-application have been substantially successful and there is no reason why they should not be awarded the appropriate costs. It is therefore ordered that applicant's ("EMC") pay the costs of the application including the costs of 2 counsel.



H FABRICIUS

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Delivered: This judgement was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 15 January 2021.

DATE OF HEARING: Matter decided on the papers filed (the judgment was reserved on 4 December 2020)

DATE OF JUDGMENT: 15 January 2021

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