



**IN THE HIGH COURT OF SOUTH AFRICA
MPUMALANGA DIVISION, MBOMBELA (MAIN SEAT)**

Case NO: 1322/2021

- (1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES / NO
(3) REVISED: YES / NO

18 July 2024

DATE

SIGNATURE

In the matter between:

**MINING AND ENVIRONMENTAL JUSTICE COMMUNITY
OF SOUTH AFRICA
GROUNDWORK**

1st Applicant

2nd Applicant

BIRDLIFE SOUTH AFRICA

3rd Applicant

ENDANGERED WILDLIFE TRUST

4th Applicant

FEDERATION FOR A SUSTAINABLE ENVIRONMENT

5th Applicant

ASSOCIATION FOR WATER AND RURAL DEVELOPMENT

6th Applicant

BENCH MARKS FOUNDATION

7th Applicant

and

**MEC FOR AGRICULTURE, RURAL DEVELOPMENT,
LAND AND ENVIRONMENTAL AFFAIRS
UTHAKA ENERGY (PTY) LTD**

1st Respondent

2nd Respondent

MINISTER OF FORESTRY, FISHERIES AND

THE ENVIRONMENT

3rd Respondent

MINISTER OF MINERAL RESOURCES AND ENERGY

4th Respondent

THE MABOLA PROTECTED ENVIRONMENT LANDOWNERS

5th Respondent

ASSOCIATION

THE VOICE COMMUNITY REPRESENTATIVE COUNCIL

6th Respondent

THE OCCUPIERS OF THE EXCLUDED PROPERTIES

7th Respondent

ORDER

1. The decision of the first respondent on 15 January 2021 to exclude four properties from the Mabola Protected Environment is reviewed and set aside.
2. The second respondent is to pay the costs.
3. Costs of the late filing of the second respondent's answering affidavit are to be paid by the second respondent on a party and party scale.

JUDGMENT

MOLELEKI AJ

Introduction

- [1] The applicants seek the review and setting aside of the first respondent's decision to exclude four properties from the Mabola Protected Environment, thus permitting coal-mining activities in the protected wetlands area. The application is brought in terms of Rule 53 of the Uniform Rules of court.
- [2] The applicants are a coalition of seven non-profit public interest organisations who are working together to ensure the continued conservation of the Mabola Protected Environment.

- [3] The first respondent is the Member of the Executive Council for Agriculture, Rural Development and Environmental Affairs, Mpumalanga (MEC).
- [4] The second respondent holds the mining rights to the mine, Yzerman, which has been attempting to establish and start a mining process in the area which fall within the Mabola Protected Environment. This area comprises of wetlands and other Eco sensitive areas.
- [5] Only the second respondent opposes the relief sought by the applicants to review and set aside the first respondent's exclusion decision.

Protected Environments

- [6] The Mabola Protected Environment was declared a protected environment in terms of section 28 of the National Environmental Management: Protected Areas Act¹, (NEMPAA) on 22 January 2014 and it is an important biodiversity and water source area.
- [7] Protected environments are declared to control the cumulative impact on natural features, biodiversity and the production of environmental goods and services. Biodiversity is essential for the processes that support all life on earth, including humans. A protected environment supports the persistence of biodiversity within the broader landscape and safeguards the long-term provision of: (a) environmental goods produced by ecosystems including food, water, fuel and timber; (b) and environmental services including clean water supply, air purification, soil formation, carbon shortage, flood attenuation and pollination.
- [8] The National Environmental Management: Protected Areas Act², was enacted to provide for the protection and conservation of ecologically viable areas representative of South Africa's biological diversity and its natural landscapes.

¹ 57 of 2003.

² Ibid.

- [9] The ecosystems of Mpumalanga are characterised by high levels of both plant and animal diversity and a significant number of unique species that are not known to occur anywhere else. Although Mpumalanga occupies only 7% of South Africa's land surface, it holds 21% of its plant species with nearly a quarter of its vegetation types nationally gazetted as threatened. Its grassland forms part of the most biodiverse biome in South Africa and contains many unique, rare and threatened species and ecosystems. The Province accounts for a high proportion of South Africa's strategic water source areas. It, therefore, plays a critical role in providing regional and national water security.
- [10] The Mabola Protected Environment falls within the Pixley ka Seme Local Municipality and is situated on Mpumalanga's southern boundary with Kwa Zulu Natal. As stated, it was declared a protected environment on 22 January 2014. The area comprising the Mabola Protected Environment was so determined, through scientific research and recognised in the policies of a number of governmental departments.
- [11] The purpose of the declaration was to: (a) enable landowners to take collective action to conserve biodiversity; (b) protect the area, which is sensitive to development due to its biological diversity, natural characteristics, scenic and landscape value and the provision of environmental goods and services; (c) protect a specific ecosystem; and (d) ensure that the use of the natural resources in the area is sustainable.
- [12] Mabola contributes to the overall water supply of the country.

The decision under review

- [13] On 15 January 2021, the first respondent, the MEC for Agriculture, Rural Development, Land and Environmental Affairs, excluded four properties from the Mabola protected Environment, namely, (a) portion 1 of Kromhoek 93HT;

(b) remainder of Kromhoek 93HT; (c) Goedgevonden 95HT; and (d) remainder of Yzerman 96HT (collectively, the excluded properties).

[14] The MEC's reason for the exclusion of the properties was to enable mining activity. This, according to the MEC, would ensure that natural resources are used for the socio-economic benefit of the community of the Pixley ka Seme Local Municipality wherein Mabola is located. Secondly that it would promote the economic growth of the community and would promote the co-existence of mining activities and conservation within the area on the properties.

[15] It is on the excluded properties that the second respondent, Uthaka Energy (Pty) Ltd intends to construct an underground coal mine.

[16] It is common cause between the parties in terms of the joint minute that the issues for determination are as follows:

1. Whether the first respondent's decision to exclude the four properties from the Mabola Protected Environment should be set aside, on any of the eight grounds of review, on the basis that it was either unlawful, irrational or unreasonable;
2. Whether paragraphs 14, 15, 17, 20, 44, 57, 114, and 178 of the second respondent's answering affidavit are irrelevant, vexatious and/or scandalous and should be struck out; and
3. Whether the second respondent should be ordered to pay punitive costs for the late filing of its answering affidavit.

The grounds of review

[17] The grounds for the review of the MEC's decision are as follows;

17.1 The decision is an unlawful circumvention of:

1. Section 48 of NEMPAA and a usurpation of the powers of the Minister of Environment, Forestry and Fisheries (the Environment Minister) and the Minister of Mineral Resources and Energy (the Minerals Minister). Commercial mining in a protected environment is prohibited unless permission has been granted by both the Environment and Minerals Ministers in terms of section 48(1)(b) of the NEMPAA. When applying the section, the Minister of Environment is required to consider the interests of local communities and the environmental principles referred to in section 2 of the National Environmental Management Act³, (NEMA).
2. The judgment of the Gauteng Division of the High Court of 8 November 2018 (The MEJCON Judgment) that sets aside the decision of the Environmental and Minerals Ministers to grant written permission for second respondent to conduct commercial mining in the Mabola Protected Environment in terms of section 48(1)(b) of the NEMPAA. The court had ordered that the decision be deferred until after the decision of the statutory appeal against the approval of second respondent's environmental programme to the Water Tribunal. According the applicants, the exclusion decision falls to be reviewed and set aside on the grounds that it was taken for an ulterior purpose/motive, in bad faith and constitutes arbitrary and capricious decision-making. Mining Environmental Justice Community Network of South Africa and Others v Minister of Environmental Affairs and Others⁴

³ 107 of 1998.

⁴ (50779/2017) [2018] ZAGPPHC 807 (8 November 2018).

3. The MEC' decision does not take into consideration the available science, policy and law regarding the protection of the Mabola Protected Environment.
4. The MEC was under an obligation to and did not consider the precautionary principle and the vulnerable ecosystems principle. Section 2(4)(a)(vii) of NEMA sets out the precautionary principle which provides that sustainable development requires the consideration of all relevant factors including that a risk averse and cautious approach is applied, which takes into account the limits of current knowledge about the consequences of decisions and actions.
5. The MEC ignored the Environment Minister' advice and failed to adhere to the principles of co-operative governance.
6. The MEC was biased or reasonably suspected of bias.
7. The MEC failed to consider the impacts of mining.
8. The MEC did not consider South Africa's International responsibilities.

[18] The essence of the applicants' case is that the proposed coal mine will have long-term negative environmental impact on the biodiversity, water resources and the essential water services that the area provides and feeds into. Importantly, that the underground mining has been identified as a land use that will compromise the biodiversity objective of the excluded properties. The applicants submitted that the excluded properties are irreplaceable critical biodiversity areas from an aquatic and terrestrial perspective; fall within a high-water yield area that has been classified as a priority river and wetland ecosystem; fall within a strategic water source area and are considered a strategic national asset that is vital for national water and economic security.

[19] The applicants aver further that, the strategic importance of Mabola as a protected environment has intensified since its declaration due to South Africa's water scarcity and the imperative to facilitate South Africa's resilience to climate change. The applicants contend therefore that, the purpose of the declaration of the Mabola Protected Environment was and still is sound and reasonable in science, policy and law.

[20] The second respondent on the other hand contends that the MEC's decision is not in terms of nor does it violate section 48 of NEMPAA. The MEC relied on section 29 of the NEMPAA which does not require consultation with the Ministers, as is the case with section 48. It is thus, the prerogative of the MEC as to which areas are excluded from a protected environment. Therefore, according to the second respondent, the applicants incorrectly interpreted section 48 by submitting that the MEC requires the approval of the Ministers.

[21] The basis for the second respondent's opposition is that:

1. The first ground of review that the MEC circumvented section 48 of NEMPAA is a point of law and not a ground for review. A review is limited to determining whether the MEC's decision was lawful, informed and reasonable and it does not have to be right. The MEC was advised by an advisory panel and all the submissions were considered. The second respondent submits that the applicable section in this instance is section 29(2)(b) of NEMPAA which authorises the MEC to withdraw the declaration issued under section 28, of an area as a protected environment or as part of an existing protected environment; exclude any part of a protected environment from the area. The MEC, therefore, gave full explanation and rationale for his decision.
2. The second ground for review that the MEC's decision is a circumvention of the NEMPAA judgment (MEJCON Judgment). The second respondent submits as follows: Although the court had reviewed and set aside the decision of the Environment Minister

granting the second respondent written permission to conduct commercial mining in the Mabola Protected Environment in terms of section 48(1)(b) of NEMPAA, the second respondent's application for written permission was remitted to the Environment and Minerals Ministers for reconsideration. It was contemplated and provided for in the court orders that the MEC may apply section 29, in which case, the Minister's permission in terms of section 48 would not be required. Therefore, it is not a circumvention of a court order but was rather envisaged.

3. The third ground that the MEC did not take into consideration the available science, policy and law regarding the protection of the Mabola Protected Environment – it is averred that what is presented as science, policy and law is the applicant's interpretation thereof. The scientific evidence has already been dealt with by the Water Tribunal where expert evidence was heard. Science does not support the applicants' submissions. South Africa as a mining country, has developed mitigating factors to deal with any possible contamination of water sources.
4. The fourth ground is that the MEC failed to consider the precautionary principle and the vulnerable ecosystems principle. In this respect the second respondent contended that section 2(4)(a)(vii) of NEMA provides for a risk-averse, cautionary approach and does not impose a ban on mining. Further that, the MEC in his reasons specifically refers to the precautionary principle and applied it and found a way to allow the mine to proceed in the interests of social development.
5. The fifth ground- The MEC ignored the Environment Minister's advice and failed to adhere to the principles of cooperative governance – the second respondent avers that section 29 of NEMPAA does not require the MEC to obtain permission from other Ministers to decide. However, the MEC consulted with all relevant inter-government agencies.

6. The sixth ground – the MEC was biased or reasonably suspected of bias- The second respondent submits that there is nothing that indicates bias. To the contrary, the MEC considered the socio-economic impacts of his decision, environmental concerns as well as the plight of the poor, whilst promoting environmental protection and sustainability.
7. The seventh ground – the MEC failed to consider the impacts of mining- the contention of the second respondent is that the MEC had section 24 of the Constitution in mind when he made the decision which provides for economic and social development. There will therefore be social economic benefit to the communities including jobs, direct investment, upliftment of the community through education and training.
8. The eight ground – the MEC failed to consider South Africa's International responsibilities – the second respondent contends that no international responsibilities are violated by moving the four properties out of the Mabola Protected Environment.

Legal Framework

- [22] Section 24 of the Constitution provides that everyone has the right to an environment that is not harmful to their health or well-being and to have the environment protected for the benefit of present and future generations through reasonable legislative and other measures that prevent pollution and ecological degradation, promote conservation and secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.
- [23] There is legislation in place to give effect to the environmental provision as contained in section 24 of the Constitution. These are: (a) The National

Environmental Management Act⁵ (NEMA, (b) The National Water Act 36 of 1998 (The national Water Act; (c) The National Environmental Management: Protected Areas Act⁶ (NEMPAA) and (d) The National Environmental Management: Biodiversity Act⁷ (NEMBA).

- [24] Section 2 of NEMA provides for a set of principles to be applied by organs of State when taking decisions which may significantly affect the environment. It also makes provision for relevant considerations to be borne in mind when sustainable development is considered as part of integrated environmental management. Section 2(4)(r) of NEMA provides that sensitive vulnerable, high dynamic or stressed ecosystems, such as ... wetlands and similar systems require specific attention in management and planning procedures, especially where they are subject to significant human resource usage and development pressure.
- [25] NEMBA provides for the management and conservation of the country's biodiversity within the framework of NEMA.
- [26] The objectives of NEMPAA are set out in section 2 thereof. Section 3 of NEMPAA provides that the State, acting through organs of state implementing legislation applicable to protected areas, acts as trustee of those areas in securing the rights contained in section 24 of the Constitution. Regarding the management and development of protected areas, in the event of conflict with any national, provincial or municipal laws, the provisions of NEMPAA shall prevail. (section 7(1) of NEMPAA).
- [27] In terms of section 48 of NEMPAA, should the proposed mining area fall within a protected area, the written permission of the Ministers of Environmental Affairs and Mineral resources is required.

⁵ 107 of 1998.

⁶ 57 of 2003.

⁷ 10 of 2004.

- [28] As stated, on 15 January 2021, the MEC excluded the four properties from the Mabola protected Environment. The decision sought to be reviewed is whether the MEC's decision to exclude the four properties from the Mabola Protected Environment should be set aside on any of the eight grounds of review on the basis that it was either unlawful, irrational or unreasonable.
- [29] On 11 February 2021 the applicants requested written reasons for the exclusion decision from the MEC in terms of section 5 of the Promotion of Administrative Justice Act⁸ (PAJA).
- [30] In summary the MEC's rationale for the exclusion as reflected in Notice 2 of 2021 in the Provincial Gazette Extraordinary No. 3225 are follows:
1. *To ensure balance towards use [sic] of national resources for socio-economic benefits of all citizens/community of Pixley ka Seme Local Municipality [sic] and the country, while promoting environmental protection and sustainability;*
 2. *To ensure/promote economic growth of the country and the community of the area;*
 3. *To promote co-existence of mining activities and conservation within the area on the properties, the boundaries of which are as indicated on addendum 1 and 2 hereto".*
- [31] The proposed mine is an underground coal mine. It is not in dispute that mining activities lead to loss of biodiversity and contamination of the soil, utilises a large amount of water and this impacts the water quantity as well as its quality due to contamination through acid mine drainage. The reduction in water quantity and quality also affects the amount of water available for human consumption. This has a detrimental impact on people's access to water and threatens water security at both local and national level.

⁸ 3 of 2000

[32] It is common cause between all the parties that the proposed coal mine will result in a degree of contamination of surface and ground water resources in the area, and that no financial provision has been made for a water treatment plant. This is one of the biodiversity concerns which the second respondent considered when it conducted its environmental impact assessment. The second respondent's experts predicted that the water will be of poor quality and will require treatment for a period of about 40 years.

[33] This takes me to the eight grounds of review. These grounds of review are effectively that the MEC did not act within the ambit of the enabling legislation, as such, his conduct was unlawful, unreasonable and procedurally unfair in failing to take relevant considerations into account and by taking irrelevant considerations into account, as contemplated in section 6(2) of PAJA.

1. The MEC's decision contravened section 48 of NEMPAA.

- i. **Davis J in Mining Environmental Justice Community Network of South Africa and Others v Minister of Environmental Affairs and Others**⁹ at par 10.7 stated, "*Section 48 (1)(b) and 48 (4) should be interpreted to mean the following: despite the fact that a person may have obtained all the necessary authorisations required in terms of all other applicable statutory provisions in order to lawfully conduct mining activities on a certain portion of land, should that land fall within a protected environment as contemplated in NEMPAA, then such a person would, in addition, need to obtain the written permission of both the Ministers of Environmental Affairs and Mineral Resources to do so. In considering a request for such permission, the Ministers shall act as custodians of such protected environment and with a strict measure of scrutiny taking into account the interests of local communities and the environmental principles referred to in Section 2 of NEMA. Effect*

⁹ (50779/2017) [2018] ZAGPPHC 807 (8 November 2018) at para 10.7.

is given by this interpretation to all the words expressly used in the section as well as the intentions of the Legislature contained in sections 2, 3, 5 and 7 of NEMPAA referred to in paragraph 4 above and the Act as a whole. It also deals with the issue of sequence of authorisations”

- ii. The declaration of Mabola Protected Environment does not constitute a complete ban on mining activities. However, there was a need to obtain written permission of both Ministers. The Ministers act as custodians of such protected environments and with a strict measure of scrutiny, the Ministers would have had to consider the interests of local communities and the environmental principles referred to in section 2 of NEMA. The MEC’s conduct is therefore contrary to the scrutiny required in terms of section 48(1)(b) of NEMPAA.
- iii. It is a settled principle of our law that each functionary operates within the purpose and ambit of his or her own enabling statutory provisions when taking administrative action¹⁰.
- iv. In **Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council**¹¹, the Constitutional Court stated that, central to the conception of our constitutional order that the Legislature and Executive in every sphere are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law.
- v. In this instance, the proposed mining activity is to take place in a protected environment. This area comprises of wetlands and grasslands which have been classified as Irreplaceable Critical

¹⁰ *Fuel Retailers Association of South Africa (Pty) Ltd v Director-General Environmental Management Mpumalanga Province* 2007(6) SA 4 (CC).

¹¹ 1999(1) SA 374 (CC) at par 48

Biodiversity Areas. Therefore, the Ministers were obliged to consider the interests of local authorities and environmental principles referred to in section 2 of NEMA with a strict manner of scrutiny and this ground of review should succeed.

2. Circumvention of the NEMPAA (The MEJCON Judgment)

- i. On 8 November, the Gauteng Division of the High Court set aside the decision of the Environmental and Mineral Ministers to grant written permission to the second respondent to conduct commercial mining in the Mabola Protected Environment in terms of section 48(1)(b) of NEMPAA. See Mining and Environmental Justice Community Network of South Africa *supra*.
- ii. The court had ordered that any decision in terms of section 48(1)(b) of the NEEMPAA should be deferred until: (a) after the decision of the statutory appeal against the approval of the second respondent's environmental management programme; (b) after the decision of the statutory appeal to the Water Tribunal against the decision to grant a water use licence to the second respondent; and (c) after a management plan for the Mabola Protected Environment has been approved by the MEC in terms of section 39(2) of the NEMPAA.
- iii. The MEC excluded the four properties from the Mabola Protected Environment without the Ministers having reconsidered the second respondent's application for permission to conduct commercial mining in the Mabola Protected Environment. This was done by the MEC in terms of section 29(b) of the NEMPAA. The second respondent's stance is that there is no violation of the court order as it was contemplated in that order that at some stage, permission may not be required from the Ministers if section 29 exclusion is granted by the MEC.

- iv. It is common cause that the management plan contemplated in the order of the MEJCON judgment has not been approved. The significance of the management plan is to describe actions needed to ensure that a protected area achieves the purpose for which it was established. In the absence of a management plan, it would be difficult to assess the impact on the natural environment. The MEC would not know how the specific part of the protected environment in which the proposed mine is to operate is going to be managed without the management plan. Even the Ministers would be precluded from exercising their discretion in terms of section 48(1) (b) of the NEMPAA without the management plan. This requirement should, therefore, not have been by-passed.
- v. In *Fuel Retailers* above at par 102, the Constitutional court stated that, *'The role of courts is especially important in the context of the protection of the environment and giving effect to the principle of sustainable. The importance of the protection of the environment cannot be gainsaid. Its protection is vital to the enjoyment of other rights contained in the Bill of Rights; indeed, it is vital to life itself. It must therefore be protected for the benefit of the present and future generations.'*
- vi. It may be, that the local community would benefit economically should the mining operations commence. This is an instance where there is tension between two conflicting interests. Whilst the court is alive to the hardships of the community and the consequences to their well-being should the mining operations not commence, such considerations are outweighed by the importance of the protection of the environment.

3. Science, policy and law

- i. The applicants contend that the MEC failed to take into consideration the available science, policy and law regarding the protection of the Mabola Protected Environment. The MEC's rationale for the exclusion of the properties to permit mining despite all the scientific reports evidencing the detrimental impacts of coal mining, was solely meant to facilitate inclusive economic development in the impoverished local communities. According to the MEC the impact could be mitigated by implementing measures identified and accepted by the competent authorities.
 - ii. As stated, local communities could benefit. However, of significance is the purpose of declaring Mabola a Protected Environment, which was to protect the irreplaceable biodiversity to protect clean water supply and other eco-system services. The main environmental concern is dewatering and acid mine drainage. Therefore, the MEC's failure to consider the available science, policy and law regarding the protection of the Mabola Protected Environment is flawed and renders the exclusion decision reviewable.
- 4. MEC's failure to consider the precautionary principle and the vulnerable ecosystem principle.
 - i. The applicants contend that section 2(4)(a)(vii) of NEMA sets out the precautionary principle. The principle provides that sustainable development requires the consideration of all relevant factors, including that a risk averse and cautious approach is applied, which takes into account the limits of current knowledge about the consequences of decisions and actions.
 - ii. The precautionary principle applies to the actions of all organs of State that may significantly affect the environment. This compels

every environmental decision maker, when faced with the impacts in respect of which there is uncertainty or a lack of information, or where the risk of substantial harm to the environment is too great, to err on the side of caution and protection of the environment.

- iii.* The Constitutional court in Fuel Retailers at par 98 when dealing with the contamination of underground water supply stated: “... *there are two matters that should be mentioned in relation to the duty of environmental authorities which are a source of concern. The first relates to the attitude of Water Affairs and Forestry and the environmental authorities. The environmental authorities and the Water Affairs and Forestry did not seem to take seriously the threat of contamination of underground water supply. The precautionary principle required these authorities to insist on adequate precautionary measures to safeguard against the contamination of underground water. This principle is applicable where, due to unavailable scientific knowledge, there is uncertainty as to the fault has been found by the panel that there is uncertainty and inadequate information regarding the impact of the proposed mine on biodiversity and ecological considerations. It is common cause there will be acid mine drainage and damage to the wetlands as a result of the mine. The precise nature and extent thereof are unknown. This calls for this court to err on the side of caution and protection of the environment impact of the proposed development.*”

- iv. It has been found by the panel that there is uncertainty and inadequate information regarding the impact of the proposed mine on biodiversity and ecological considerations. It is common cause there will be acid mine drainage and damage to the wetlands as a result of the mine. The precise nature and extent thereof are unknown. This calls for this court to err on the side of caution and protection of the environment.

- v. On the proper application of the precautionary principle, the exclusion decision should not have been made, thus rendering the decision reviewable.
- 5. The MEC ignored the Environment Minister' advice and failed to adhere to the principle of co-operative governance.
 - i. Section 41 of the Constitution requires all spheres of government and all organs of State to (a) exercise their powers and perform their functions in a manner that does not encroach on the geographical, functional or institutional integrity of government in another sphere; and (b) co-operate with one another in mutual trust and good faith by: consulting one another on matters of common interest; coordinating their actions with one another; adhering to agreed procedures; and avoiding proceedings against one another.
 - ii. On 14 October 2019 the Environment Minister addressed correspondence to the MEC, following the MEC' Notice of Intention to exclude the four properties from the Mabola Protected Environment. In the correspondence the Environment Minister drew the attention of the MEC to the NEMPAA/ MEJCON judgment which remitted the second respondent's application to the Ministers for reconsideration. The Environment Minister requested the MEC to reconsider his intention to exclude the properties as the exclusion may have unintended consequences and cost implications.
 - iii. Legality, which is the incidence of rule of law, requires the exercise of public power to be in compliance with the law and

within the boundaries set by the law, and the rule of law requires rationality and the non-arbitrary exercise of power.¹²

- iv. The MEC was required to seek to achieve the objects of the Intergovernmental Relations Act¹³ by (a) taking into consideration the circumstances and material interests of other governmental organs of State in other governments; (b) consulting other affected organs of State; (c) coordinating actions when implementing policy or legislation affecting the material interests of other governments; and (d) avoiding unnecessary and wasteful duplication or jurisdictional contents.
- v. Section 32 of the NEMPAA requires the MEC to consult with the Minister and the relevant municipality in accordance with the principles of co-operative governance, and to consult with all affected provincial organs of State.
- vi. Section 40(2) of the Constitution directs spheres of government to adhere to the principles of co-operative governance; and section 41 directs the spheres of government to co-operate with one another.
- vii. The MEC' failure to adhere to the principles of co-operative governance, renders the exclusion decision reviewable.

6. Bias or reasonably suspected of bias

- i. The applicants contend that the MEC was biased in his decision making as he associated himself with one side of a dispute.
- ii. The impartial adjudication of administrative proceedings is a cornerstone of any fair and just legal system. The test for bias is

¹² *Masetlha v President of the Republic of South Africa and Another* [2017] ZACC 20; 2008(1) SA 566 (CC) at par 173.

¹³ 13 of 2005.

whether a reasonable, objective and informed person would on the correct facts reasonably apprehend that the decision maker has not or will not bring an impartial mind to bear on the adjudication of the matter, that is a mind open to persuasion by the evidence and submissions made.¹⁴

- iii. The MEC did not approach this matter with his mind open to persuasion but had shut his mind to any submissions made or evidence tendered in support of the case he had to decide. The MEC publicly associated himself as being in favour of the establishment of the mine in the Mabola Protected Environment. Before the MEC made his decision to exclude the properties known, he made a public statement on 8 May 2020 that he was in support of the mine. He was also quoted by the City Press Newspaper article as saying he was committed to the opening of the mine as it would boost the economy.
- iv. The MEC' public statements, along with his support for the mine, is to the exclusion of and in disregard of the environment significance of the area and the long-term consequences of allowing mining to commence in the Mabola Protected Area. This indicates clear bias in favour of mining, or at the very least, conduct which gives rise to a reasonable suspicion of bias. The MEC was required to conduct himself in a manner which showed neutrality and openness to all competing interests and considerations. The exclusion decision falls to be reviewed and set aside.

7. Failure to consider the impacts of mining

- i. The social and economic benefits which the proposed mine would have for the local community must be weighed against the disadvantages of the proposed mine. The second

¹⁴ *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 1999(4) SA 147 (CC) par 35 and 48.

respondent indicated that the mine would generate 576 employment opportunities when fully operational.

- ii. The reports concluded that the proposed mining will have high impact on the wetland's ecology of the local area, even with mitigation. The impact on the water resource will not only affect the local community but other downstream water users who rely on the strategic water source in that area. Several families will have to be relocated with consequent devastation to those affected.
- iii. A drop in groundwater levels will affect access to water. This would affect the biodiversity and natural grassland in the area. There will be high impact on the wetland ecology. The proposed benefits to the local community are incomparable to the long-term negative consequences to the environment, which in turn will impact the local community. The MEC' failure to consider the impact of mining renders the exclusion decision reviewable.

8. Failure to consider South Africa's International responsibilities.

- i. Section 2(4)(n) of NEMA requires that global and international responsibilities relating to the environment must be discharged in the national interest. Some of South Africa's responsibilities include (a) the general obligations imposed by the Ramsar Convention on Wetlands; (b) the duty imposed by the Migratory Species Convention; (c) the duties imposed by the Convention on Biological Diversity; (d) the duty imposed by the United Nations Framework Convention; and (e) the duties imposed on South Africa in terms of the Revised Protocol on Shared Water Courses.
- ii. When providing his reasons for the exclusion decision, the MEC did not make any reference to South Africa' International

responsibilities. South Africa has obligations to protect and promote the conservation of wetlands in its territory. The wetlands in the proposed mine area are considered natural and unmodified. Wetlands play a major role in moderating the quantity and quality of water of major rivers.

- iii. The mining operations will negatively affect the quality and ecological importance of the wetlands. This would have implications for South Africa's International environmental obligations. The other effect will be on migratory birds or their patterns. This exclusion decision equally falls to be reviewed.

Application to strike out

[34] Applicants seek an order in terms of Rule 6(15) striking out certain allegations in the answering affidavit of the second respondent. The basis thereof is that the allegations are abusive, vexatious personal attacks and defamatory material against the applicants. Further that, they are at best, wholly irrelevant to the dispute between the parties and cause the applicants prejudice; that the second respondent characteristically inserted them purely with the intent to harass, annoy and cloud the real issues; that the allegations have the potential to cause irreparable to the integrity and reputation of the applicants and their members; and that considerable time and resources would need to be expended to answer all of the allegations.

[35] I have considered all the complaints referred to by the applicants. I do not propose to deal with each allegation as it would make this judgment unduly lengthy.

[36] The averments contained in the relevant paragraphs can be summarised as follows: the documents and articles the applicants are presenting as fact, are merely opinions by special interest groups; the authors of these "so-called" reports are not qualified by this court; what was presented as absolute

science by the applicants was wholly debunked by the Water Tribunal; the applicants have not disclosed their source of funding; the applicants have a mandate to review any decision which is not in their favour, irrespective of the *bona fides* thereof.

[37] The second respondent's contention in this regard is that, there is nothing to be struck out from its answering affidavit. The second respondent submits that, it is entitled to criticise the applicant's approach and offer its own opinion and to ensure that the court understands the context, especially when faced with a Green Lobby who present their cases in a tainted manner.

[38] The meaning of the terms scandalous, vexatious or irrelevant have been stated in the context of Rule 6(15) as follows:

1. Scandalous matter – allegations which may or may not be relevant, but which are so worded as to be abusive or defamatory.
2. Vexatious matter – allegations which may or may not be relevant but are so worded as to convey an intention to harass or annoy.
3. Irrelevant – allegations which do not apply to the matter in hand and do not contribute in one way or the other to a decision of such matter.

[39] Two requirements must be satisfied before an application to strike out matter from any affidavit can succeed: first, the matter sought to be struck out must be scandalous, vexatious or irrelevant; second, the court must be satisfied that if such matter is not struck out the parties seeking such relief would be prejudiced.

[40] In ***Beinash v Wixley***¹⁵ the court emphasized the significance of the two requirements. The court stated further that, in any event, even if it could properly be said that this or any other part of the averments made in the impugned affidavit were indeed 'scandalous, vexatious or irrelevant', it does not follow that the application to strike out this paragraph should succeed.

¹⁵ [1999] ZASCA 32; 1997(3) SA 721 (SCA) at 733A-B.

[41] What is clear from this rule is that two requirements must be satisfied before an application to strike out matter from any affidavit can succeed. It has been held that the striking out procedure is not intended to be utilised to make technical objections which merely serve to increase costs and are of no advantage to the litigating parties. It is for these reasons that sufficient degree of prejudice should be present and such proof of prejudice is required. ***Anderson and Another v Port Elizabeth Municipality***¹⁶. I am not satisfied that prejudice can be deduced from the facts if the allegations contained from the impugned answering affidavit were not struck out.

Costs

[42] The two basic principles to costs are, firstly that the award of costs is in the discretion of the presiding officer. Secondly that a successful party should, as a general rule, be awarded costs. The applicants have been substantially successful in respect of the main application and are entitled to their costs.

[43] The next question is whether a punitive cost order should be granted against the second respondent for the late filing of its answering affidavit. The applicants contend for a punitive cost order against the second respondent on the basis that the second respondent made allegations against the applicants that have been shown to be baseless, manifestly scurrilous and irrelevant. Further that, the second respondent filed its answering affidavit only eight court days before this application was set down to be heard on an unopposed basis; that it did so in circumstances where it had failed to respond to two letters regarding the filing of its answering affidavit, and failed to request an extension of time.

[44] Although the second respondent had not applied for an extension of time, it had tendered costs.

¹⁶ 1954(2) SA 299 (E)

[45] It is trite that the rationale for a punitive attorney and client costs order is more than mere punishment of the losing party. From judgments of the Supreme Court of Appeal, a court should be disinclined to grant costs orders on the scale as between attorney and client until salient argument and sufficient forensic debate have helped to establish the appropriate judicial basis on which to make them. **AA Alloy Foundry (Pty) Ltd v Titaco Projects (Pty) Ltd**¹⁷ and **Thoroughbred Breeders Association v Price Waterhouse**.¹⁸

[46] I am not persuaded that a punitive cost order is warranted. In the premises, I am of the view that costs should be awarded in favour of the applicants against the respondent only on a party and party scale.

[47] Accordingly, I make the following order: -

Order

1. The decision of the first respondent on 15 January 2021 to exclude four properties from the Mabola Protected Environment is reviewed and set aside.
2. The second respondent is to pay the costs.
3. Costs of the late filing of the second respondent's answering affidavit are to be paid by the second respondent on a party and party scale.

¹⁷ 2000(1) SA 639 (SCA) at 648 E-I.

¹⁸ 2001(4) SA 551 (SCA) at 596 D-I.



M MOLELEKI

Acting Judge of The High Court
Mpumalanga Division, Mbombela (Main Seat)

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Date of Hearing: 16 April 2024

Date of Judgment: 18 July 2024

