



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

**Case No. 1957/2024**

|                                           |                                                                                    |
|-------------------------------------------|------------------------------------------------------------------------------------|
| <b>DELETE WHICHEVER IS NOT APPLICABLE</b> |                                                                                    |
| (1)                                       | REPORTABLE: YES/NO                                                                 |
| (2)                                       | OF INTEREST TO OTHER JUDGES: YES/NO                                                |
| (3)                                       | REVISED YES/NO                                                                     |
| <u>26 June 2025</u>                       |  |
| DATE                                      | SIGNATURE                                                                          |

**MOUNTAINLANDS ESTATE OWNERS**

**ASSOCIATION**

First Applicant

**SAPPI SOUTHERN AFRICA LIMITED**

Second Applicant

**SIMPLY SEE (PTY) LIMITED**

Third Applicant

**BARBERTON CHAMBER OF BUSINESS**

Fourth Applicant

**and**

**MPUMALANGA TOURISM AND PARKS**

**AGENCY**

First Respondent

**SIPHELELE GENERAL TRADING 15 (PTY) LIMITED**

Second Respondent

**THE MEC OF THE MPUMALANGA DEPARTMENT:**

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**JUDGMENT**

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**MONTSHO-MOLOISANE AJ**

[1.] This is an application for a final interdict lodged by the Applicants against the First and Second Respondents, where they seek the following final relief:

- 1.1. That the First and Second Respondents, acting directly or through their employees or agents, are interdicted from demolishing any structures or undertaking any form of construction activities on any of the Geosites forming a part of the Barberton Makhonjwa Mountains Geotrail situated on, and adjacent to the P77-1 Provincial road which connects the town Barberton with the Bulembu/Josefsdal border post on the Eswatini border, without the written consent of the Applicants, and the prior written permission of the Third Respondent;
- 1.2. That the First Respondent pay the costs of this application on an attorney and client scale, and that any other Respondent opposing the relief sought, also pay the costs on a similar scale; and
- 1.3. That further and/or alternative relief be granted to the Applicants.

[2.] No relief is sought against the Third and Fourth Respondents, who have been joined as parties who may have an interest in the subject matter of the proceedings.

- [3.] The only party opposing the application is the First Respondent, and the grounds of opposition are outlined in the Answering affidavit deposed to by its Executive Manager: Biodiversity Conservation Management, Ms Noncebo Kunene.

#### The Applicants

- [4.] The First Applicant is Mountainlands Estate Owners Association ("Owners' Association"), a voluntary association consisting of the registered owners of the properties comprising the Mountainlands Estate. It is the owner of Portion 25 of the Farm Dycedale 368 JU, Mpumalanga province, where it is also domiciled.
- [5.] The Second and Third Applicants are companies incorporated in terms of the company laws of South Africa, and are the registered owners of the Remainder of Farm Schoonoord 380 JU, Farm Loenen 381 JU, as well as Portion 26 and other portions of the Farm Dycedale 368 JU, Mpumalanga province.
- [6.] The Fourth Applicant is the Barberton Chamber of Business ("the Chamber of Business"), a voluntary common law association based in Barberton, Mpumalanga province.

### The Respondents

- [7.] The First Respondent is the Mpumalanga Tourism and Parks Agency ("MTPA"), a government agency established in terms of the Mpumalanga Tourism and Parks Agency Act, 5 of 2005 ("the MTPA Act").
- [8.] The Second Respondent is the contractor that was appointed by the MTPA on 29 September 2023, to upgrade and refurbish the Geosites located on the First to Third Applicants' properties, and on other properties along the Barberton Makhonjwa Geotrail.
- [9.] The Third Respondent is the Member of Executive Council of the Mpumalanga Department of Public Works, Roads and Transport ("the MEC for Public Works and Roads"), and the Fourth Respondent, is the City of Mbombela Local Municipality ("the Municipality"). The Third and Fourth Respondents are not opposing the application.

### Background facts

- [10.] From the affidavits filed of record, the following facts are common cause:
- 10.1. The First, Second and Third Applicants are the registered owners of the fixed properties, located within the Barberton Makhonjwa Geotrail;
- 10.2. The said properties of the First to Third Applicants constitute 9(nine) of the 13(thirteen) Geosites along the Barberton Makhonjwa Geotrail;
- 10.3. The location of the 13 Geosites, the infrastructure and facilities constructed thereon, fall partly within and partly out of the road reserve

over which the P77-1 provincial road has been constructed. The road reserve traverses through the properties of the First to Third Applicants. The P77-1 is a provincial road as defined in Section 1 of the Mpumalanga Roads Act ,1 of 2008.

- 10.4. The infrastructure and facilities on the 13 (thirteen) Geosites were constructed during 2012/2013 by the Chamber of Business in terms of the Barberton Tourism and Biodiversity Corridor Programme ("Batobic"), in collaboration with the national Department of Tourism and the Department of Forestry, Fisheries and Environment ("the DFFE"), the Municipality, the provincial department of Public Works and Roads, and with the consent of all the relevant property owners.
- 10.5. The Barberton Makhonjwa Geotrail is a 37-kilometer self-drive trail that features 13 (thirteen) view sites ("Geosites"), located at significant geological sites. Each Geosite has illustrated interpretative panels that explains the unique geological significance of the site, and some are provided with picnic facilities.
- 10.6. The Barberton Makhonjwa Geotrail is a tourist attraction that exploits the unique geology and natural attributes of the Barberton Makhonjwa Mountains.
- 10.7. The significance of the Geosites is that visitors and tourists can stop and have views thereof, learn about the unique geology and history of the place, and make use of the infrastructure and facilities established

there, which consist of permanent structures leading off the road to paved parking areas, and brick and stone walls displaying tourist information, as well as concrete retaining walls and baboon proof wastebins.

- 10.8. Since the completion of the Geotrail, the Chamber of Business has maintained the Geosites by keeping them clean and effecting repairs and maintenance as required, to the satisfaction of the stake holders.
- 10.9. In July 2018, the United Nations Educational, Scientific and Cultural Organisation ("UNESCO") inscribed the Barberton Makhonjwa Mountains as a World Heritage Site, at its 42<sup>nd</sup> session, for its geological significance and they became known as the BMM-WHS. UNESCO recognised the site for containing the best preserved, oldest and most diverse sequence of volcanic and sedimentary rocks on earth.
- 10.10. Pursuant thereto, the State assumed obligations under the World Heritage Convention Act, 49 of 1999 ("the Convention Act"), which related to the management, protection and promotion of the BMM-WHS.
- 10.11. On 12 March 2021, the then Minister of the DFFE, Ms B.D. Greecy, declared the MEC for Finance, Economic Development and Tourism: Mpumalanga province ("the MEC for Tourism"), as the authority responsible for the management, protection and promotion of the BMM-WHS, by publication in Governmental Gazette No 44272, Notice 213, in terms of the provisions of Section 8 of the Convention Act.

- 10.12. On 13 August 2021, the MEC for Tourism, Mr P.V. Mkhathshwa, wrote a letter assigning the MTPA, the First Respondent herein, as the Management Authority of the BMM-WHS in terms of the Convention Act, on behalf of the Tourism department, as the entity responsible for the sustainable management and promotion of tourism.
- 10.13. On 09 May 2022, the South African Heritage Resources Agency ("SAHRA") and the MTPA entered into a Memorandum of Agreement in terms of which the MTPA undertook the responsibility to take all reasonable measures to; protect all parts of the Geosites from abuse or disfigurement, damage, destruction, unauthorised removal, unauthorised excavation, and to comply with any of the conditions of title of the Site and the laws or regulations affecting owners or occupiers of the land.
- 10.14. Subsequent to entering into the said Memorandum of Agreement, the MTPA awarded a tender to the Second Respondent to "*refurbish and upgrade*" the 13(thirteen) Geosites comprising the Barberton Makhonjwa Geotrail, and thereafter formally appointed the Second Respondent as the contractor for the said project, on 29 September 2023.
- 10.15. The Second Respondent commenced with construction activities at two of the Geosites located on the properties, namely the Eureka View Geosites, which is located on the property of the First and Third Applicants, and Greenstone View Geosites, which is located on the property of the Municipality, after its appointment, and later proceeded

to the White Tidal Sandstone, the Painted Quarry and the Makhonjwa View Geosites, which belong to the First to Third Applicants.

- 10.16. Upon becoming aware of the construction activities taking place on their properties without consent, the Applicants' representatives approached the workers on site and inquired about their activities there. Subsequent thereto, the Applicants' representatives had a number of engagements with the MTPA that culminated in a meeting with officials of the MTPA and its Chief Executive Officer ("CEO"), Mr Vilakazi at the offices of the Second Applicant in Ngodwana, on 17 January 2024, at the instance of the Applicants' attorney of record, Mr Richard Spoor of Richard Spoor Incorporated ('Mr Spoor').
- 10.17. The matters discussed and agreed to at that meeting are recorded in a letter that Mr Spoor sent to the CEO of the MTPA on 30 January 2024. It is recorded therein that the MTPA agreed to stay the proposed Geotrail upgrade pending the outcome of a consultative process and agreement with the landowners and Batobic, and ultimately the consent of the larger WHS landowner group.
- 10.18. On 30 April 2024, the Applicants' attorney of record sent a Letter of demand to the MTPA and the Second Respondent, after noticing that the construction activities were still ongoing. He demanded the Cessation of all construction activities on the Barberton Makhonjwa Geotrail, following the failure to stop the construction activities as agreed to at the meeting held on 17 January 2024.

10.19. Subsequent to the service of the aforementioned Letter of demand on the First and Second Respondents, the Applicant lodged an urgent application on or about 03 May 2024. It was however struck off the roll with costs for lack of urgency by Acting Madam Justice Mazibuko on 14 May 2024. The Applicants' application for leave to appeal was also dismissed with costs on 11 July 2024.

10.20. The matter was re-enrolled on the normal opposed roll which is before this Court.

[11.] The Applicants delivered a further Supplementary affidavit on 04 October 2024, wherein further averments were made regarding the fire damage caused by the Second Respondent to the Geosite belonging to the Second Applicant, and included correspondence from Professor Cristoph Heubeck ("Prof Heubeck"), a geology Professor at the Friederick Schiller University in Jena, Germany, sent to the Applicants and the First Respondent regarding the nature of the damage caused and a report compiled by him. The MTPA responded to the all allegations made in the said affidavit, in its Supplementary Answering affidavit, delivered on 20 November 2024.

[12.] On 24 July 2024, African Heritage Resources Agency ("SAHRA"), wrote a letter to the MTPA "*Order for immediate cessation of all works or actions*" (Cessation Order"), in respect of works conducted on the Barberton Makhonjwa Geotrail.

#### The Applicants' submissions

[13.] Counsel for the Applicants, Mr Sibanda contended that:

- 13.1. the First and Second Respondents' presence and construction activities undertaken on the 13 (thirteen) Geosites, nine of which are situated on the Applicants' properties, is unlawful;
- 13.2. the Applicants and other landowners were not consulted in the design and execution of the proposed upgrade and have not consented thereto, or to the presence of the First and Second Respondents on their properties;
- 13.3. the Applicants have consented to grant members of the public access to the Geosites for the purposes of tourism, education and recreational purposes only;
- 13.4. the Second Respondent's construction activities on the First to Third Applicants' properties, where it had established mobile offices, damaged and defaced some of the Geosites, which conduct prompted the Manager: Heritage Protection Unit of SAHRA, acting in terms of the provisions of Sections 27 and 50(10) of the National Heritage Resources Act, 25 of 1999 ("NHRA"), to issue Cessation Order on 24 July 2024, for the immediate cessation of all works or actions for the *"upgrade and refurbishment of the Barberton Makhonjwa Geotrail"*, with immediate effect.
- 13.5. the First and Second Respondents' construction activities entail the destruction of the First to Third Applicants' properties, namely the existing built concrete aprons, paved parking areas, brick and stone walls, concrete tables and benches, and concrete plinths for signage,

which are attached to the soil and are of a permanent nature. Furthermore, the deliberate destruction of their properties without their consent constitutes malicious damage to property and trespassing.

- 13.6. Sappi's commercial forestry operations are at a particular risk of veld and forest fires, and at a time, the Lowveld Escarpment Fire Protection Association ("LEFPA") had issued a burning prohibition in terms of Section 10(1) of the National Veld and Forest Fire Act, 101 of 1998;
- 13.7. Sappi officials laid a criminal complaint at the Barberton Police Station against the Second Respondent, for causing veld fires;
- 13.8. there is no provision in the NHRA that authorises the First and Second Respondents to go onto the property of the Applicants for the purpose of carrying out construction activities, save with the consent of the property owners concerned;
- 13.9. there is no provision in the Convention Act, nor in the declaration of the BMM as a WHS, nor in the assignment of the Management Authority by the MEC to the MTPA, that authorises the MTPA and the Second Respondent to go onto the Applicants' properties for the purpose of carrying out construction activities there, save with the consent of the relevant property owner.
- 13.10. that while the P77-1 is a provincial road that traverses the Applicants' properties, the land falling within the road reserve has not been expropriated by the State, and remains the property of the landowner concerned; and that any construction related activities not related to

the use of the land within the road reserve require the consent of both the land owner and the relevant road authority, being the MEC for Public Works, Roads and Transport, which was never obtained;

13.11. that the First and Second Respondents acted unlawfully in that in terms of the provisions of Section 13(1) of the Mpumalanga Roads Act, 1 of 2008, the First and Second Respondents are not permitted to erect, lay, establish or alter any structure or permit the erection, laying, establishment or alteration of any structure:

- a) on, over or below the surface of a provincial road so as to encroach on a provincial road; or
- b) in a building restriction area within 20 metres of the boundary of a main road or district road.

13.12. That the First and Second Respondents added unlawfully in that they did not have the consent of the landowners to carry out the construction activities on the land within the P77-1 road reserve, or permission of the MEC to do so.

[14.] Mr Sibanda further contended that the Applicants have satisfied the requirements for the granting of a final interdict, and referred the Court to the case of *Setlogelo v Setlogelo*<sup>1</sup>, where the requirements for an interdict are set out. In addition, he sought a punitive costs order of attorney and client based on the conduct of the MTPA and the Second Respondents.

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<sup>1</sup> *Setlogelo v Setlogelo* 1914 AD 221 at 227.

The First Respondent's submissions

[15.] Counsel for the MTPA, Mr Seape, raised two preliminary issues, firstly with regard to the Applicants' filing of more than three sets of affidavits, and secondly on the mootness of the application.

[16.] He contended that:

16.1. the Applicants' Further Supplementary affidavits should be disregarded as no leave was sought prior to filing additional affidavits after the Replying affidavit was filed, before the urgent application was heard;

16.2. in support of this contention, he referred this Court to the case of *Hano Trading CC v JR 209 Investments (Pty) Ltd and Another*<sup>2</sup>, where the Court stated that in motion proceedings, only three sets of affidavits have to be filed.

16.3. he further contended that even if the contents of the Supplementary affidavits were to be considered, the allegations pertaining to Sappi, the Second Applicant herein, are an "*irrelevant atmospheric matter*" which has no bearing on the issues before Court. Furthermore, he contended that the correspondence relied on, which was exchanged between Prof Heubeck and the Applicants, and copied to the MTPA, the subject of which was "*Destruction of protected WHS Geosite Outcrop*", and his report amount to hearsay evidence, which is inadmissible in the absence of his Confirmatory affidavit.

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<sup>2</sup> Hano Trading CC v JR 209 Investments (Pty) Ltd and Another 2013 (1) SA 156

16.4. he contended that the contents of the "Further Supplementary" affidavits filed on 07 and 08 May 2024, should be disregarded.

[17.] On the preliminary point of mootness, he argued that the issues are moot on the basis of the Cessation Order issued by SAHRA to the MTPA on 24 July 2024, which is referred to in the Applicants' Supplementary affidavit delivered on 04 October 2024. This letter unequivocally stated that the First Respondent required an application to be made to SAHRA in terms of the provisions of Section 27(18) of the NHRA, prior to commencement of any activities, and that no such application was made by the MTPA, nor was a permit granted to do so.

[18.] On this ground, it was contended, the interdictory relief sought was moot.

[19.] I deem it appropriate to address this submission later in this judgment, as the issue of mootness is in my view, interrelated with the requirements for the final interdict, which is the main subject matter of these proceedings.

[20.] On the final interdict sought by the Applicants, Counsel for the MTPA contended that:

20.1. the Applicants' ownership of nine of the thirteen Geosites is in dispute, as no Court has made a finding that they acquired the said Geosites by accession. As such, they did not establish a clear right;

- 20.2. on the injury committed or reasonable apprehension that it may be committed, it was contended that the Applicants failed to establish that the project will cause harm if the final interdict sought is not granted;
- 20.3. regarding the requirement of the absence of an alternative remedy, Mr Seape contended that the Applicants failed to satisfy this requirement as they can sue for damages for loss suffered as a result of the proposed upgrade and construction activities; and
- 20.4. on the above-stated submissions, the Applicants failed to satisfy the requirements for the final interdict to be granted, and the application should therefore be dismissed with costs, to be awarded on an attorney and client scale.

### **The Issues**

[21.] This Court is required to determine whether:

- 21.1. the Applicants' "Further Supplementary" affidavits, should be upheld, as the leave of the Court was not sought by the Applicants;
- 21.2. the relief sought is moot; and
- 21.3. on the case pleaded by the Applicants and the MTPA in the affidavits before Court, the Applicants have satisfied the requirements for the final interdict to be granted.

[22.] For a better understanding of the issues herein, it is necessary at the outset, to outline the provisions of the relevant applicable legislation, which I shall deal with hereunder.

## **Legislative Framework**

### **The NHRA**

[23.] In terms of Section 11 of this Act, SAHRA was established as the national body to co-ordinate and promote the management of heritage resources at the national level, as contemplated in Section 13 of the Act. It is a statutory requirement to obtain a permit for various activities related to heritage resources, including alteration to structures, excavations and the removal of objects.

[24.] The NHRA provides for monitoring and enforcement mechanisms to ensure compliance with its provisions. The following provisions are relevant for the determination of the issues herein:

24.1. Section 27(18) of the NHRA provides:

*"No person may destroy, damage, deface, excavate, alter, remove from its original position, subdivide or change the planning status of any heritage sites without a permit issued by the heritage resources authority responsible for the protection of such site".*

24.2. Section 27 (21) also provides:

27(21) *The responsible heritage resources authority may, by agreement with the owner of a heritage site-*

- a) conserve or improve any heritage site;*
- b) construct fences, walls or gates around or on a heritage site;*
- c) acquire or construct and maintain an access road to a heritage site over any land, and construct upon such land, fences, walls or gates; or*
- d) erect signs on or near a site". (emphasis added).*

#### The MTPA Act

[25.] The MTPA was established in terms of Section 2 of the Act. Section 3 of the Act stipulates that the statutory object of the MTPA is to provide for the sustainable management and promotion of tourism and nature conservation within the Mpumalanga province, and to ensure the sustainable utilisation of natural resources.

#### Mpumalanga Roads Act

[26.] Section 13(1) of the Mpumalanga Road Act prohibits the carrying out of any construction or related work on the road, without prior permission of the MEC for Public Works, Roads and Transport. The P77-1 is a provincial road as contemplated in Section 1 of the Act.

## **Evaluation and the Law**

[27.] I shall firstly deal with the status of the “Further Supplementary” affidavits filed by the Applicants, and thereafter the issue of mootness and lastly consider the legal requirements for the granting of a final interdict.

[28.] In addressing the contention regarding the admissibility of 2(two) “Further Supplementary” affidavits filed by the Applicants in the Urgent application, it is important to state that the Applicants and the MTPA filed additional affidavits pursuant to the management order and directive of this Court dated 06 August 2024. This brought the number of affidavits filed by the Applicants to 6(six) and those of the MTPA to 2(two) sets,

[29.] The filing of further affidavits in application proceedings was addressed in the Hano judgment *supra*, to which Counsel for MTPA referred, where the Court held that:

*“Rule 6(5)(e) establishes clearly that the filing of further affidavits is only permitted with the indulgence of the Court. A Court, as arbiter, has the sole discretion whether to allow the affidavits or not. A Court will only exercise its discretion in this regard where there is good reason for doing so<sup>3</sup>”*

[30.] It is important to state that the Court in the Hano judgment focused on the prejudice that the filing of further affidavits had on an opponent who had to meet a case based on the contents of such additional affidavits, without dealing with them. I am of the view that this matter is distinguishable from the Hano judgment in that:

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<sup>3</sup> At paragraph 11

- 30.1. the litigation history in this matter commenced on 03 May 2024, when the urgent application, which was struck off the roll on 14 May 2024, was launched;
- 30.2. the first and second Supplementary affidavits were filed on 07 and 08 May 2024 respectively. The MTPA filed its Notice of intention to oppose on 06 May 2024 and its Answering affidavit on 13 May 2024;
- 30.3. the deponent to the Answering affidavit of the MTPA was therefore able to respond to the Founding affidavit and the first and second Supplementary affidavits. The deponent did not serve a Rule 30A notice of non-compliance with the Rules of this Court, on the Applicants, nor make an application to Court in that regard, which, in any event, had to be preceded by such notice. In taking the matter further, I point out that the prejudice referred to in the Hano judgment was absent in this instance, as the MTPA was able to respond to all the allegations prior to the hearing of the application.
- 30.4. In my view, the principle enunciated in the case of *PFE International Inc (BVI) and Others v Industrial Development Corporation of South Africa Ltd*,<sup>4</sup> finds application in this case, as the Court held as follows:
- "Since the rules are made for courts to facilitate the adjudication of cases, the superior courts enjoy the power to regulate their processes, taking into account the interests of justice. It is this power that makes every superior court the master of its own process. It enables a*

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<sup>4</sup> *PFE International Inc (BVI) and Others v Industrial Development Corporation of South Africa Ltd* 2013 (1) SA 1 (CC)

*superior court to lay down a process to be followed in particular cases, even if that process deviates from what its rules prescribe. Consistent with that power, this court may, in the interests of justice depart from its own rules”.*

[31.] In light of the *PFE* case *supra*, I find that there is no merit in the contention that the further Supplementary affidavits should be disregarded as the allegations therein were properly responded to.

[32.] I find that it is therefore in the interests of justice that I deviate from Rule 6(5)(e) and consider all the affidavits filed of record, in the absence of any prejudice.

[33.] I now turn to deal with the law applicable to the granting of a final interdict, that is whether the Applicants have satisfied the requirements for the granting of the final interdict sought.

#### *The Requirements for a final interdict*

[34.] The law in regard to the grant of a final interdict is settled. An Applicant for such an interdict must show:

34.1. a clear right;

34.2. an injury actually committed or reasonably apprehended; and

34.3. the absence of an alternative remedy or similar protection by any other ordinary remedy.

### Clear right

[35.] I need to point out that to determine whether an Applicant has a clear right is a matter of substantive law, and whether that right is clear, is a matter of evidence. In order to establish a clear right, the Applicants have to prove, on a balance of probabilities, facts which in terms of substantive law establish the right relied on<sup>5</sup>. Absent a clear right, the application for a final interdict should fail.

[36.] It is not in dispute that the Applicants herein are the registered owners of protection which 9(nine) of the 13(thirteen) Geosites are located and that the provisions of Sections 27(18), 27(21) of the NHRA quoted at paragraph 23 above, are applicable to the Applicants' case.

### An injury committed or reasonably apprehended

[37.] It is trite that where a wrongful act giving rise to the injury has already occurred, it must be of a continuing nature, or there must be a reasonable apprehension that it will be repeated. In the case of *NCSPCA v Openshaw*<sup>6</sup>, the SCA reiterated that an interdict is not a remedy for a past invasion of rights but is concerned with present or future infringements.

[38.] The Applicants have, in their affidavits set out the extent of the damage already caused by the Second Respondent's removal of paving and concrete tables along the Geotrail.

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<sup>5</sup> LAWSA Vol II, 2<sup>nd</sup> Ed at it 397

<sup>6</sup> *NCSPCA v Openshaw* 2008 (5) SA 339 (SCA) at para [20]

[39.] However, the deponent to the Supplementary Answering affidavit of the MTPA has admitted that the construction activities which led to this application, stopped after SAHRA issued the above-mentioned Cessation Order to the MTPA on 24 July 2024. According to SAHRA, the Cessation Order shall be valid until such time that the MTPA complies with the statutory requirements referred to in paragraph 10 of the Order which states as follows:

*"10. This Order shall be valid until such time as you have complied with the following requirements:*

*10.1 All documents relating to any EA application in terms of NEMA, if conducted, must be submitted to SAHRA;*

*10.2 An investigation by a geologist and palaeontologist pertaining to any heritage resources that may have been damaged by the upgrade and refurbishment, inclusive of a site visit, must be submitted to SAHRA for review and further action;*

*10.3 Appropriate permit applications must be made for all works on all protected sites;*

*10.4 No further development may occur without comment from SAHRA in this regard".*

[40.] The Cessation Order is no doubt congruent with what is stated in the letter sent to the MTPA by the Applicants' attorney of record, Mr Spoor, dated 30 January 2024, which reiterated the agreement reached by the Applicants' representatives and the CEO and officials of the MTPA, at a meeting they

attended at the Second Applicant's offices in Ngodwana on 17 January 2024.

Of particular importance is paragraph 2 and 2.4 thereof, which states:

"2     *The matters arising from that meeting, which Batobic and the Geotrail landowners have requested us to emphasize are the following:*

2.1     ...

2.2     ...

2.3     ...

2.4     *The MTPA has agreed to stay the proposed Geotrail upgrade, pending the outcome of a consultative process and agreement with both the Geotrail landowners and Batobic and ultimately the consent of the larger WHS landowner group".*

[41.]     The Letter of demand from the Applicants' attorney, Mr Spoor, dated 30 April 2024, further indicates that the construction activities could only be carried out once the MTPA had complied with, or satisfied certain conditions. Paragraph 11.5 of the letter states:

*"The MTPA and Siphelele General Trading furnish a written undertaking that they will not carry out any further construction activities on any Geosites of the Barberton Makhonjwa Geotrail, without the express written approval of the landowners (including the Mbombela Local Municipality) and the MEC for Mpumalanga Department: Public Works, Roads and Transport".*

[42.] On the correct interpretation of the excerpts from the two letters above, it is indicative that the relief sought by the Applicants is of an interim nature cannot be a final interdict.

*The absence of an alternative remedy*

[43.] In this instance, a Court may not grant an interdict in circumstances where there is an alternative remedy available to an Applicant, and which may safeguard the right sought to be protected.

[44.] I need to be emphatic that the purpose of an interdict is to put an end to conduct in breach of the Applicants' rights. In the case of *Hotz and Others v University of Cape Town*<sup>7</sup>, the SCA held, in relation to the lack of an alternative remedy requisite, that the existence of another remedy will only preclude the grant of an interdict where the proposed alternative will afford the injured party a remedy that gives it similar protection to an interdict against the injury that is occurring or is apprehended.

[45.] The case of *Food and Allied Workers' Union v Scandia Delicatessen CC*<sup>8</sup> is also authority for the view that criminal prosecution may also be a suitable alternative remedy in appropriate cases. The SCA, per Farlam JA held that: "... it can be accepted that in certain cases, a criminal prosecution may well be an adequate remedy such as to disentitle a person to whom such remedy is available, from obtaining an interdict"<sup>9</sup>.

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<sup>7</sup> *Hotz and Others v University of Cape Town* 2017 (2) SA 485 (SCA) at para [36]

<sup>8</sup> *Food and Allied Workers' Union v Scandia Delicatessen CC* [2001] 3 SA 613 (SCA)

<sup>9</sup> At para [35]

The undisputed facts

[46.] In order to establish each of the three requisite elements, it is appropriate to have regard to those facts pleaded by the Applicants, which are admitted by the MTPA or are not disputed. In this instance, the MTPA does not dispute that:

- 46.1. the First to Third Applicants are the registered owners of 9(nine) of the 13(thirteen) properties over which the Geosites are located;
- 46.2. The P77-1 road reserve that traverses the thirteen Geosites, has not been expropriated;
- 46.3. The Second Respondent established construction sites on the First to Third Applicants' properties along the Barberton Makhonjwa Geotrail, and was engaged in construction activities thereon from October 2023;
- 46.4. The First to Third Applicants did not consent to the presence of the MTPA and the Second Respondent on their properties;
- 46.5. That fire damage was caused to the property of the Second Applicant by the Second Respondent's employees;
- 46.6. SAHRA and the MTPA entered into a Memorandum of Agreement on 09 May 2022; and
- 46.7. SAHRA issued a Cessation Order to the MTPA on 24 July 2024 due to the latter's failure to comply with statutory requirements set out in the NAHRA, and in the Memorandum of Agreement.

[47.] This Court is bound by the *starre decisis* principle and the rule enunciated in the case of *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*<sup>10</sup>, which was stated as follows:

*"Where, in proceedings on notice of motion, disputes of fact have arisen on the affidavits, a final order, whether it be an interdict or some other form of relief, may be granted if those facts averred in the Applicant's affidavits, which have been admitted by the Respondent, together with the facts alleged by the Respondent, justify the order".*

[48.] It bears mentioning that I have not considered the averments made by the deponent to the Founding and Supplementary affidavits regarding the correspondence sent by Prof Heubeck to the MTPA and the Applicants on 15 July 2024, nor considered the report compiled by him in respect of the activities that were taking place on the 13(thirteen) Geosites, which he allegedly presented at a meeting convened by SAHRA at the Second Applicant's property in Ngodwana, as no Confirmatory affidavit from him was filed. In my view Mr Seape, Counsel for the MTPA, correctly contended that the said correspondence and report amount to hearsay evidence, which is inadmissible.

### **Findings**

[49.] Having considered legal authorities referred to above and the totality of the evidence pleaded in the affidavits, I now turn to consider whether the

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<sup>10</sup> *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634 I-635 D

Applicants have satisfied all three requirements for the final interdict to be granted.

[50.] Regarding the first requirement of the existence of a clear right I find that:

50.1. there is no merit in the submission of Counsel for the MTPA, that the First to Third Applicants' ownership over the said properties is in dispute as no Court has ever made a finding that they acquired the Geosites by accession. The fact of the matter is that the provisions of Section 27(21) require the MTPA to engage with the relevant landowners prior to commencement of any construction activities on Geosites located on their properties;

50.2. the MTPA, as the managing authority, acted contrary to the provisions of the NHRA and the law, which prompted SAHRA to issue the Cessation Order to the MTPA on 24 July 2024;

[51.] On this basis the contention that the Applicants have no clear right has no merit and should fail.

[52.] Consequently, I find that the Applicants have satisfied the requirement of the existence of a clear right.

[53.] Regarding the second requirement of an injury committed or reasonably apprehended, I find that the Applicants have succeeded in establishing that actual damage was caused to their properties from October 2023, as a result of which their representatives had several engagements with the CEO and officials of the MTPA in an endeavour to resolve their concerns. This culminated with the issue of the Cessation Order.

- [54.] Regarding the third requisite element of the absence of an alternative remedy, I am of the opinion that this has been negated by the Cessation Order, and the fact that there is a remedy that the Applicants may explore through the criminal justice system referred to in the *Food and Allied Workers' Union* case *supra*. This is also confirmed by the fact that the Second Applicant laid a criminal charge after the Second Respondent's employees caused fire to its property.
- [55.] On the issue of mootness, I am persuaded by the submission of Counsel for the MTPA, Mr Seape, who contended that the matter has become moot. He correctly referred this Court to the Constitutional Court judgment in the case of *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others*<sup>11</sup>, where the principle of mootness was adequately dealt with.
- [56.] In another fairly recent judgment in the case of *Minister of Tourism v Afriforum NPC*<sup>12</sup> the Constitutional Court stated the following:

*"A case is moot when there is no longer a live dispute or controversy between the parties which would be practically affected in one way or another by a Court's decision, or which would be resolved by a Court's decision. A case is also moot when a Court's decision would be of academic interest only"*<sup>13</sup>.

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<sup>11</sup> *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* 2000 (2) SA 1 (CC) at para [21]

<sup>12</sup> *Minister of Tourism v Afriforum NPC* [2023] ZACC 7 (CC) at para 23

<sup>13</sup> *Vide: Solidariteit Helpende Hand NPC and Others v Minister of Cooperative Governance and Traditional Affairs* [2023] ZA SCA 35 (31 March 2023)

- [57.] I am satisfied that there was no factual or legal basis to proceed with the application after 24 July 2024, when SAHRA echoed what Mr Spoor had stated in the letter dated 30 January and the Letter of demand dated 30 April 2024, that the Applicants required a consultative process to take place prior to any works being commenced along the Barberton Makhonjwa Geotrail.
- [58.] There is therefore no doubt that the adjudication of this application is nothing but an academic exercise.
- [59.] Consequently, I find that even if I were to find that the application is not moot, the Applicants failed to satisfy the third requirement stipulated in the *Setlogelo* and *Hotz* judgments referred to *supra*.

### **Costs**

- [60.] Counsel for the Applicants contended that the costs of the application should be awarded on an Attorney and client scale, as the MTPA had breached clear undertakings made at a meeting held by the parties on 17 January 2024 and that the damage caused by the Second Respondent's activities was at the instance of the MTPA.
- [61.] On the contrary, Counsel for the MTPA contended that the costs should be awarded against the Applicants on an Attorney and client scale, firstly as there was no merit in the application, and secondly due to their persistence in continuing with the application for the final interdict even after SAHRA had ordered the MTPA to cease with all the works and activities, which order was complied with.

[62.] It is trite law that the basic rule is that the making of a costs order remains in the discretion of the Court, which must be exercised judicially. The general rule is however that the successful party is normally entitled to an award of costs in its favour<sup>14</sup>.

[63.] The locus classicus case on the award of costs on an Attorney and client scale is *Nel v Waterberg Landbouwers Ko-operatiewe Vereeniging* 1946 (AD) 596<sup>15</sup>. There Tindall JA in a unanimous judgment stated that:

*“... by reason of special considerations arising either from the circumstances which give rise to the action or from the conduct of the losing party, the court in a particular case may consider it just, by means of such an order, to ensure more effectually than it can do by means of a judgment for party and party costs, that a successful party will not be out of pocket in respect of the expense caused by the litigation.”*<sup>16</sup>

[64.] In the case of *Biowatch Trust v Registrar, Genetic Resources*<sup>17</sup>, the Constitutional Court held that:

*“In litigation between the governmental and a private party seeking to assert a constitutional right, Affordable Medicines established the principle that ordinarily, if the government loses, it should pay the costs of the other side, and if the government wins, each party should bear its own costs”*<sup>18</sup>.

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<sup>14</sup> Cilliers: The Law of Costs, Lexis Nexus at para 203

<sup>15</sup> Interpreted in *Mudzima v Chinhoyi Municipality* 1986 (3) SA 140 (ZH) at 143 D – I, 144

<sup>16</sup> At 607

<sup>17</sup> *Biowatch Trust v Registrar, Genetic Resources* 2009 (6) SA 232 (CC) at para [22]

<sup>18</sup> *Affordable Medicines Trust and Others v Minister of Health and Others* 2006 (3) SA 247 (CC) at para [139]

- [65.] Section 34 of the Constitution of South Africa, 1996 guarantees everyone the right of access to Courts and justice. The application does not involve a constitutional challenge but focuses on the state's statutory obligations as set out in the provisions of NHRA referred to above, and the failure to do so.
- [66.] The Applicants did not withdraw the application despite the fact that the Cessation Order of SAHRA effectively halted all the activities that gave rise to this application.
- [67.] On the contrary, the MTPA acted in total disregard of the peremptory provisions of the NHRA and commenced with construction activities on 13(thirteen) Geosites on the Barberton Makhonjwa Geotrail, 9(nine) of which are located on the First to Third Applicants' properties. This was contrary to the contents of the Memorandum of Agreement concluded by the SAHRA and the MTPA, on 14 May 2022, wherein the obligations of the MTPA, and the peremptory statutory requirements were dealt with.
- [68.] Furthermore, the MTPA does not deny that the Applicants took steps to address the non-compliance with the statutory obligations of the MTPA, by approaching the Second Respondent immediately upon becoming aware of the construction activities on their properties, and engagements between the Applicants and the MTPA took place prior to commencement of litigation.
- [69.] In the circumstances, I cannot be oblivious of the fact that although the Applicants failed to withdraw the application for a final interdict after 24 July 2024, it is the MTPA that triggered the litigation by acting contrary to the applicable legislative provisions, and the above-mentioned Memorandum of Agreement.

[70.] Having regard to the litigation history of this matter, and events that took place prior to commencement thereof, I find that the principle enunciated by the Constitutional Court in the *Affordable Medicines* and *Biowatch* cases *supra*, is applicable in this case.

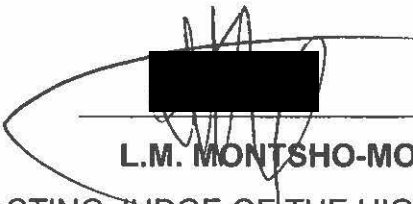
[71.] I am therefore of the view that there is no justification to impose a costs order on the Applicants on the basis that the application against the MTPA which is a government Respondent, is not successful.

### **ORDER**

[72.] In the result, I make the following Order:

72.1. The application for the final interdict is dismissed.

72.2. There is no order as to costs.

  
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**L.M. MONTSHO-MOLOISANE**  
ACTING JUDGE OF THE HIGH COURT  
MPUMALANGA DIVISION, MBOMBELA

Date heard : 06 March 2025

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Judgment electronically delivered

by circulation to all parties : 26 June 2025

### **Appearances**

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