HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

CASE NO: 11761/2021

(1) REPORTABLE: NO.
(2) OF INTEREST TO OTHER JUDGES: NO.
(3) REVISED.
DATE 30 March 2021

SIGNATURE

In the matter between:

MINING AND ENVIRONMENTAL JUSTICE COMMUNITY NETWORK OF SOUTH AFRICA	First Applicant
GROUNDWORK	Second Applicant
BIRDLIFE SOUTH AFRICA	Third Applicant
ENDANGERED WILDLIFE TRUST	Fourth Applicant
FEDERATION FOR A SUSTAINABLE ENVIRONMENT	Fifth Applicant
ASSOCIATION FOR WATER AND RURAL DEVELOPMENT	Sixth Applicant
THE BENCH MARKS FOUNDATION	Seventh Applicant

and

UTHAKA ENERGY (PTY)	First Respondent
MEC FOR AGRICULTURE, RURAL DEVELOPMEMENT, LAND AND ENVIRONMENTAL AFFAIRS, MPUMALANGA	Second Respondent
THE MINISTER OF ENVIRONMENT, FORESTRY AND FISHERIES	Third Respondent

MINISTER OF MINERAL RESOURCES AND ENERGY	Fourth Respondent
ACTING CHIEF DEIRECTOR: ENVIRONMENTAL AFFAIRS, DEPARTMENTOF AGRICULTURE, RURAL DEVELOPMENT, LAND AND ENVIRONMENTAL AFFAIRS, MPUMALANGA	Sixth Respodent
GERT SIBANDE DISTRICT MUNICIPALITY	Seventh Respondent
DR PIXLEY KA ISAKA SEME LOCAL MUNICIPALITY	Eighth Respondent
THE WATER TRIBUNAL	Ninth Respondent
ESTATE LATE PIERRE WILLIAM BRUWER UYS	Tenth Repondent
OCCUPIERS OF PORTION 1 OF THE FARM YZERMYN 96 HT	Eleventh Respondent
THE VOICE COMMUNITY REPRESENTATION COUNCIL	Twelfth Respondent
THE MABOLA PROTECTED ENVIRONEMENT LANDOWNERS ASSOCIATION	Thirteenth Respondent

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J U D G M E N T

This urgent application was heard in open court and otherwise disposed of in the terms of the Directives of the Judge President of this Division. The judgment and order are accordingly published and distributed electronically.

DAVIS, J

[1] Introduction

1.1 This is an urgent application whereby, as an interim measure, the applicants seek to prevent the commencement of mining activities on properties which previously fell within the Mabola Protected Environment (the "MPE").

1.2 Prior to the hearing of this application, the Acting Deputy Judge President directed that the parties should attempt to minimize their papers to be filed in this urgent application, so as to not exceed 500 pages. The seven applicants' founding papers, together with annexures and confirmatory

affidavits comprised 279 pages and their replying papers some 32 pages. The twelfth respondent, The Voice Community Representative Council ("The Voice"), filed an answering affidavit of 54 pages. In stark contrast, the first respondent, Uthaka Energy (Pty) Ltd ("Uthaka") filed papers which, together with annexures far exceeded 5800 pages and that is not even taking into account the further documents insisted on in terms of Rule 35 (12). In addition to heads of arguments uploaded on Caselines, counsel for Uthaka at the hearing, handed up bundles and bundles of further documents, without any attempt at complying with this courts' directives regarding the electronic filing and uploading of documents on the Caselines platform.

1.3 The result of the above, was that it was not possible to render a judgment on 23 March 2021, being the day before the mining activities were scheduled to commence. An order was handed down on 23 March 2021 with the indication that the reasons for that order would be contained in this judgment, which is handed down on an urgent basis on 30 March 2021, that is 13 days after the hearing.

[2] The parties

2.1 The applicants are Mining And Environmental Justice Community Network of South Africa ("MEJCON"), Groundwork, Birdlife South Africa, Endangered Wildlife Trust, Federation for a Sustainable Environment, Association for Water And Rural Development and The Bench Marks Foundation. They have previously been described as a range of non-governmental, non-profit community, environmental and human rights organisations.

2.2 The respondents are Uthaka, MEC for Agriculture, Rural Development,

Land and Environmental Affairs, Mpumalanga (the "MEC"), the Minister of Environment, Forestry and Fisheries, the Minister of Mineral Resources and Energy, the Minister of Human Settlements, Water and Sanitaiton, the Acting Chief Director: Environmental Affairs, Department of Agriculture, Rural Development, Land and Environmental Affairs, Mpumalanga, Gert Sibande District Municipality, Dr Pixley Ka Isaka Seme Local Municipality,The Water Tribunal, Estate Late Pierre William Bruwer Uys, Occupiers of Portion 1 of The Farm Yzermyn 96 HT, The Voice and The Mabola Protected Environment Landowners Association.

2.3 Only Uthaka and The Voice opposed the application.

[3] The existing litigation and legal restrictions

3.1 The areas immediately adjacent to the property on which Uthaka proposes to commence mining activities, fall within the (the MPE). These areas comprise of wetlands and other ecosensitive areas.

3.2 The MPE has been declared a protected environment in terms of the provisions of the National Environmental Management: Protected Areas Act, 57 of 2003 ("NEMPAA"), in particular, section 28 thereof, on 22 January 2014 by the current MEC's predecessor. This was done after an extensive consultative process (in which Uthaka, previously known as Atha-Africa, had partaken) and followed upon a publication of a national list of ecosystems that are threatened and in need of protection. This was done on 9 December 2011 in terms of section 57 of the National Environmental Management Biodiversity Act, 10 of 2004 ("NEMBA") and included the area comprising the MPE.

3.3 On 20 August 2016 the then Minister of Environmental Affairs and on 21 November 2016 the then Minister of Mineral Resources granted Uthaka

permission to mine within the MPE. The proposed mine is known as the "Yzerfontein Underground Coal Mine". The surface infrastructure of the proposed mine then fell in the MPE and the proposed underground footprint extended into the MPE. The mining proposal consists of utilizing a mining method which comprises of the removal of large areas of coal containing ore and leaving in place underground "pillars" of ore to support the "roof" of the underground mine. The mining activities would also include the extraction, crushing, screening and stockpiling of ore and coal and the off-site transportation thereof. The estimated life of the mine is 15 years.

3.4 The mine would create employment opportunities for the surrounding community, both during the construction and operational phases of the mine. I shall deal with this aspect hereinlater when dealing with The Voice's opposition to the urgent application.

3.5 The decisions of the Ministers referred to in paragraph 3.3 above whereby permission had been granted to Uthaka to mine in the MPE, had been taken on review by the applicants. This court, on 8 November 2018, set the Ministers' decisions aside in a judgment subsequently reported as Mining and Environmental Justice Community Network of South Africa and Others v Minister of Environmental Affairs and Others [2019] 1 All SA 491 (GP) (8 November 2018) (the "MEJCON – judgment").

3.6 The order granted in the abovementioned matter reads as follows:

> "*1. The decision of the first respondent on 20 August 2016 to grant the third respondent written permission to conduct commercial mining in the Mabola Protected Environment in terms of section 48(1)(b) of the National Environmental*

Management: Protected Area Act 57 of 2003 ("NEMPAA") is reviewed and set aside.

2. *The decision of the second respondent on 21 November 2016 to grant the third respondent written permission to conduct commercial mining in the Mabola Protected Environment in terms of section 48(1)(b) of NEMPAA is reviewed and set aside.*

3. *The third respondent's application for written permission to conduct commercial mining in the Mabola Protected Environment in terms of section 48(1)(b) of NEMPAA is remitted to the first and second respondents for reconsideration.*

4. *In reconsidering the third respondent's application for written permissions to conduct commercial mining in the Mabola Protected Environment in terms of section 48(1)(b) of NEMPAA, the first and second respondents are directed to consider all relevant considerations and:*

    4.1 *to comply with section 2 and 4 of the Promotion of Administrative Justice Act 3 of 2000;*

    4.2 *to take into account the interests of local communities and the environmental principles referred to in section 2 of the National Environmental Management Act 107 of 1998 ("NEMA");*

4.3 to defer any decision in terms of section 48(1)(b) of NEMPAA until after the decision of:

4.3.1 the applicants' statutory appeal to the Director General: Department of Mineral Resources in terms of the Mineral and Petroleum Resources Development Act 28 of 2002 against the approval of the third respondent's environmental management programme; and

4.3.2 the applicants' statutory appeal to the Water Tribunal in term of the National Water Act 36 of 1998 against the decision to issue a water use licence to the third respondent;

4.4 not to consider the granting of permission to conduct commercial mining in the Mabola Protected Environmental in terms of section 48(1)(b) of NEMPAA until a management plan for the MPE has been approved by the fifth respondent in terms of section 39(2) of NEMPAA and to consider the contents thereof.

5. In the event that, prior to the completion of the reconsideration contemplated in paragraphs 3 and 4, the fifth respondent decides in terms of section 29(b) of the National Environmental Management: Protected Areas Act 57 of 2003, to exclude the farms referred to in Provincial Notice 127 of 2018 ("Gazette notice"), from the Mabola Protected Environment, any party may apply to Court on the same papers, duly supplemented, on notice to the other parties, for

an order varying paragraphs 3 and 4 or granting such alternative, further or interim relief as may be just and equitable in the circumstances.

6. *The first, second and fifth respondents are directed to pay the applicant's costs of this application, jointly and severally on the attorney and client scale, the one paying the other to be absolved, such costs to include the costs of two Counsel*".

3.7 On 11 February 2019, Uthaka's application for leave to appeal the above order was refused with costs. On 23 April 2019 the Supreme Court of Appeal dismissed Uthaka's application for leave to appeal, with costs. On 9 July 2019 the President of the Supreme Court of Appeal dismissed Uthaka's application for reconsideration of the previous dismissal and on 6 November 2019, the Constitutional Court dismissed Uthaka's application for leave to appeal to that court, also with costs.

3.8 The said ministers have, to date, not reconsidered Uthaka's applications for permission to conduct commercial mining in the MPE. Instead, the MEC has excluded the four (of six) properties on which the proposed mine will be situated and which previously formed part of the MPE from the MPE. This was done by way of a publication in the Provincial Gazette of 15 January 2021 in terms of section 29(b) of NEMPAA. The properties are Portion 1 of Kromhoek 93HT, Remainder of Kromhoek 93 HT, Goedgevonden 95HT and Remainder of Yzerfontein 96 HT, comprising in total some 2 750 ha.

3.9 In the meantime a number of reviews and internal appeal processes have been lodged and are still pending against various decisions relating to different aspects of the proposed mining operations in terms of which

Uthaka has been given permission to proceed with its mining operations. These are following:

3.9.1 The applicants' appeal in this division under case number A155/19 in terms of section 149 of the National Water Act 36 of 1998;

3.9.2 The applicants' judicial review in this division under case number 86261/19 of the water use licence;

3.9.3 The applicants' internal statutory appeal against the approval of Uthaka's Environmental Management Programme;

3.9.4 The applicants' judicial review of the environmental authorisation (in the Mpumalanga Division of the High Court, Mbombela under case number 1390/18);

3.9.5 The applicants' judicial review of Uthaka's mining right (in this division under case number 73278/15);

3.9.6 The applicants' judicial review of the dicision by the Gert Sibande District Joint Municipal Planning Tribunal to approve the rezoning of Portion 1 of the farm Yzermyn 96 HT from agriculture to mining, and the Municipal Appeal Authority of the Dr Pixley Ka Isaka Seme Local Municapality's confirmation of the approval of that decision (in the Mpumalanga Division of the High Court, Middleburg under case number 1344/20).

3.10 It is in these circumstances that Uthaka proposed commencing mining operations on 24 March 2021. The applicants argued that Uthaka should be interdicted and restrained from doing so until all the above processes have been finalized. In addition, the applicants claim that Uthaka should

be so interdicted until it has obtained a valid mining right in respect of which the period of commencement has been duly extended, it has exhausted the statutory procedures in respect of the owner of portion 1 of Yzerfontein 96 HT in terms of section 96 of the Mineral and Petroleum Resources Development Act, 28 of 2002 and has fulfilled all the conditions laid down in statutory authorizations, including The Water Tribunal. Most important, the applicants intend taking the MEC's exclusion of the properties referred to in paragraph 3.8 above from the MPE, on review.

3.11 The applicants do not need an interdict in order to enforce their rights of review, but claim that there is a reasonable apprehension of irreparable harm, should Uthaka not be restrained from mining in the interim.

[4] Jurisdiction and lis pendens

4.1 Uthaka has objected to the jurisdiction of this court and has alleged that the subject matter of this application is already pending before another court.

4.2 The argument pertaining to jurisdiction is (to quote from the heads of argument submitted on behalf of Uthaka) "... *that the applicants are in the wrong court and that this application should have been launched either in the Gauteng Local Division, Johannesburg or in the Mpumalanga Provincial Division, Mbombela* ...".

4.3 The reasons for the above are that Uthaka is "located" in Johannesburg and that Portion 1 of the Yzermyn farm is located within the area of jurisdiction of the Mpumalanga High Court.

4.4 The argument against the choice of the two divisions of the Gauteng High Court does not have substance: the two divisions exercise concurrent jurisdiction. The argument based on the judgment in In re: Nedbank Ltd v

Thobejane and related matters 2019 (1) SA 594 (GP) is equally without substance: the court in that matter found it inappropriate if a choice of court prejudices an indigent defendant. Uthaka can hardly claim such a classification for itself.

4.5 In the order referred to in paragraph 3.6 above, this court already envisaged the possibility of a situation like the present arising, namely where the MEC may excise the properties in question from the MPE without the relevant Ministers having performed any "reconsideration" function. In such a case, the applicants were already granted leave to approach this court. This leave, by itself, entitled the approach (or "return") to the court which had jurisdiction at the time. The fact that it has been done by the applicants under a new case number, does not detract from this fact.

4.6 Uthaka has not argued that this court does not have jurisdiction, but that another court "should" have been "preferred". I find that the previous order is a sufficient *ratio jurisdictionis* (reason for exercising jurisdiction) and that this court, once the occurrence foreshadowed in its previous order occurred, remained seized with the matter and was therefore the court of choice.

4.7 Insofar as there may be litigation pending in other divisions, the subject matter and the parties involved are not identical. The objection of *lis pendens* can therefore also not succeed. In any event, in respect of a plea of *lis pendens*, a court has a discretion and the extent of previous litigation in this court, is clearly a weighty factor in exercising the discretion in favour of the applicants, which I hereby do. I find no prejudice for any of the respondents in exercising the discretion in this fashion and none has been claimed by any of them.

4.8 In conclusion, the objections against this court exercising jurisdiction, are rejected.

[5] The requirements for an interim interdict

5.1 These requirements, often referred to as "trite" appear in The Law of South Africa (LAWSA), Vol 11 at [411] and in The Law and Practice of Interdicts, Prest, Juta & Co 1996 with reference to the well-known case of Setlogelo v Setlogelo 1914 AD 221 at 227.

5.2 For more than a century our courts have held that, for an applicant to obtain a final interdict, such applicant must show a clear right, an injury committed or reasonably apprehended and no alternative remedy. If the application is for an interim interdict, the further requirements are added: the right need not be clear, provided that it is prima facie established, even if open to some doubt and the balance of convenience must favour the relief claimed. See, in addition to the Setlogelo-judgment, Webster v Mitchell 1948 (1) SA 1186 (W) at 1189 as restated in, inter alia, Knox D'Arcy v Jamieson 1995 (2) SA 579 (W) at 592 H – 593 B.

5.3 A further important aspect to be considered in respect of an interim interdict is that the relief sought must be concerned with future events. See: National Treasury v Opposition to Urban Tolling Alliance and Others 2012 (6) SA 223 (CC).

[6] The apprehension of irreparable harm in the context of a protected environment

6.1 The issue of possible foreseeable irreparable harm, should an interim interdict not be granted, is, in the context of this case, a convenient starting

point as most of the other requirements for such an interdict will be illustrated or canvassed by consideration of this issue.

6.2 Uthaka's stance in opposing the relief sought is, in a nutshell, this: it maintains that it has obtained all the necessary statutory authorisations needed to commence mining operations and that, insofar as its mining operations may cause environmental disturbance, the effect thereof will be mitigated by the rehabilitation plans and other preventative measures in place.

6.3 In addition, Uthaka lays claim to a utilitarian consideration, namely the loss of profit and income and prevention of job-creation, should an interim order be granted. Although this claim is more closely related to the question of balance of convenience, as justification for it, Uthaka relies heavily on the principles of "sustainable development", which again ties in with the issues of ecological damages and the protection of the environment.

6.4 Uthaka repeatedly, in the extensive argument, referred to the fact that a "cautionary approach" is neither applicable nor appropriate in the circumstances of this case.

6.5 In terms of section 24 of the Constitution of the Republic of South Africa 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.

6.6 The legislation in question to give effect to the abovementioned environmental provision contained in the Constitution, are the National Environmental Management Act 107 of 1998 ("NEMA"), the National Environmental Management: Biodiversity Act 10 of 2004 ("NEMBA"), the National Environmental Management: Protected Areas Act 57 of 2003 ("NEMPAA") and the National Water Act 36 of 1998 ("NWA"), as already referred to in part above.

6.7 The statutory framework created by the aforesaid legislation regulating mining in a protected environment, has been set out comprehensively in the MEJCON – judgment at paragraph [4] thereof and repetition thereof here is unnecessary, save to highlight that, in terms of section 7(1) of NEMPAA, regarding the management and development of protected environments, in the event of conflict with any national, provincial or municipal laws, the provisions of NEMPAA shall prevail.

6.8 Should, therefore, the applicants be successful in the review application of the decision whereby the MEC excised four of the six farms on which the proposed mining is to take place from the MPE, Uthaka will be back in the position it was after the MECJON – judgment and again be subject to the consequences thereof and the restrictions imposed by the abovementioned legislation.

6.9 It is therefore necessary to consider whether the applicants have a reasonable prospect of success in that review application and, whether, in view of such prospects, the commencement or continuation of mining operations should be permitted, pending the finalization of such a review.

6.10 The applicant's grounds of review of the MEC's decision are multi-pronged. They have been formulated in the following terms:

6.10.1 The MEC's decision is an attempt to circumvent section 48 of NEMPAA and is reviewable in terms of section 6(2)(b)(e)(vi), 6(2)(f)(ii)(aa)of PAJA.

6.10.2 The MEC's decision is an attempt to circumvent the order of this Court in the MEJCON – judgment and is reviewable in terms of section 6(2)(a)(iii), 6(2)(b)(e)(vi), 6(2)(e)(ii), 6(2)(f)(ii)(aa) and 6(2)(h) of PAJA.

6.10.3 The MEC's decision failed to consider the legislative framework, science and policy regarding the protection of the Mabola Protected Environment and is reviewable in terms of section 6(2)(e)(iii), 6(2)(f)(ii)(dd) and 6(2)(h) of PAJA.

6.10.4 The MEC failed to consider the precautionary principle and the vulnerable ecosystems principle and his decision is reviewable in terms of section 6(2)(b), 6(2)(e)(iii), 6(2)(f)(ii)(dd) and 6(2)(h) of PAJA.

6.10.5 The MEC failed to wait for the approval and finalization of the Mabola Protected Environment management plan and his decision is reviewable in terms of section 6(2)(b), 6(2)(b)(e)(vi), 6(2)(e)(iii) and 6 (2)(h) of PAJA.

6.10.6 The MEC expressed public intention in respect of the Mabola Protected Environment and his decision is reviewable in terms of section 6(2)(a)(iii), 6(2)(b)(e)(iii), 6(2)(e)(ii) and 6(2)(f)(ii)(aa) of PAJA.

6.10.7 The MEC failed to consider the impact of mining generally and to the local community and his decision is reviewable in terms of section 6(2)(b), 6(2)(e)(iii), 6(2)(f)(ii)(dd) and 6(2)(h) of PAJA.

6.10.8 The MEC failed to take into account South Africa's international responsibilities relating to the environment and his decision is reviewable in terms of section 6(2)(b), 6(2)(e)(iii) and 6(2)(f)(ii)(dd) of PAJA.

6.11 In my view, it is crucial to note that the MEC has not responded to the abovementioned attack and neither has he, to date of hearing of the application, given any reasons for his decision.

6.12 NEMPAA provides in section 3 thereof that "in fulfilling the rights contained in section 24 of the Constitution, the State, through the organs of state implementing legislation applicable to protected areas, must act as the trustee of protected areas in the Republic". Although the principle of sustainable development finds application, it is subject to more scrutiny than otherwise if the area in which the proposed development, in this case, underground coal mining, is to take place, is a protected environment. The MPE comprises of wetlands and grasslands which, despite Uthaka's above contentions, have largely been classified as "Irreplaceable Critical Biodeversity Areas". (See the MEJCON – judgment (above) at paragraph 5.4 and the sources referred to in footnote 7 of that judgment). Any excision of property previously falling within such a protected area, for purposes of accommodating such mining, would therefore equally be subject to such scrutiny.

6.13 After some 84 pages of dealing with various aspects of the disputes in question (except for the issue of the MEC's decision) Uthaka's Senior Vice

President, in Uthaka's answering affidavit, commenced dealing with the applicant's allegations regarding the proposed review of the MEC's decision. The proposed grounds of review are not directly confronted but, attacked in a general fashion and by way of dealing with matters either extraneous to the decision or not directly related to the issue. In order not to be unfair to Uthaka, the complete sum-total of the answer to the proposed review of the MEC's decision is quoted here:

> "*I note that the Applicants have not yet launched an application for the review of the decision of the MEC to exclude the four relevant mining properties from the Mabola Protected Environment. I respectfully submit that an intention to bring a review application does not establish any prima facie right for the purposes of an interim interdict. Any of the proposed grounds of review will be addressed in due course if and when such a review application is launched. There is in any event no merit in these grounds of review and the chickens of the Applicants are coming home to roost. From the outset, Uthaka suspected that the whole initiative to have the Mabola Protected Environment declared, in the face of the existing Prospecting Right of Uthaka at the time, was simply a stratagem by the local landowners as well as environmental organisations to prevent coal-mining in the area. This suspicion has been confirmed. Firstly, despite being under a statutory obligation to develop a management plan within a year, the management committee failed to do so. Secondly, immediately after the declaration a media campaign was initiated to falsely propagate that the reason for the declaration was to protect the area against coal-mining. This was done despite the fact that to the knowledge of all concerned, Portion 1 of the Farm Yzermyn was expressly excluded from the declaration*

in order to accommodate the surface infrastructure for the underground mine which was, to the knowledge of all concerned, already in the planning stage. Thirdly, I refer the Court to the Google Images, prepared by Charlaine Baartjes, of which a copy is attached as annexure 'PT 26" hereto. The first image, dated 19 May 2014, shows an undisputed area of wetlands. The second image, dated 18 June 2018, shows how the wetlands and biodiversity was destroyed as a direct result of agricultural development. The land is question is situated north of the mining area but the one field constitute the area of 56.79 ha and the other one some 14.5 ha. This is an agricultural development of more than 70 ha and is furthermore a development that is literally three times larger than the 22.4 ha required for the surface infrastructure of the mining projects.

6.14 It should come as no surprise that the generalisations in the "counter-attack" contained in the above paragraph based on a "stratagem", have not been supported by evidence. On the face of it, therefore, coupled with the absence of reaction from the MEC, I find that the proposed review application has such sufficient prospects of success, that it cannot be ignored or brushed aside. In view of the fact that the actual decision on the merits of the review application will fall in the purview of another court, it is prudent to refrain from expressing any further comment in this regard, save to state that the possibility of Uthaka being back in the same position mentioned in paragraph 6.8 above, remain a live one.

6.15 A further consequence of Uthaka's answer, is the concession that a management plan for the MPE, as contemplated in paragraph 4.4 of the MEJCON – order, has not yet been approved. The importance of such a

plan has been highlighted by the Supreme Court of Appeal judgment in Umfolozi Sugar Planters Ltd v Isimangaliso Wetland Park Authority and Others (873/2017) [2018] ZASCA 144 (1October 2018).

6.16 The existence of the pending processes mentioned in the applicant's notice of motion (some of which also formed the basis of Uthaka's jurisdictional objections and *lis pendens* arguments) have also been conceded by Uthaka. One of these, is the issue of Uthaka's water use licence. There is currently a special appeal pending in terms of section 149(1) of the NWA against the appeal decision of the Water Tribunal whereby a decision has been granted in favour of Uthaka's water use licence. The applicants contend that this appeal suspends the decision while Uthaka contends that this is not the case, and moreover, that the special appeal is not on the facts or the merits, but on a point of law only. Be that as it may, the view I take of the present urgent application, is that I need not resolve that issue.

6.17 The applicants further claim that mining should be suspended pending the final determination of whether Uthaka has all the required authorisations it claims it has. As the relief is only of an interim nature, the applicants need only establish the right they assert on a *prima facie* basis, "even if open to doubt".

6.18 Apart from the scrutiny mentioned in paragrpah 6.12 above, which would form part of the review application of the MEC's decision, the question is whether mining should be allowed "in the meantime"? Uthaka repetitively labelled the applicant's concerns "alarmist" and makes various submissions about run-off slopes for rainwater in the areas surrounding the surface activities of the proposed mine and the fact that the upper of the underground aquifers (where most of the contamination will occur) is

separated from the lower aquifer by a layer of rock with alleged low permeability. This, coupled with the mitigation and rehabilitation programmes proposed by Uthaka, should allay any fears of environmental damage, so Uthaka argues.

6.19 But should one take the risk? Or, put differently, have the applicants demonstrated a reasonable apprehension of a risk of irreversible damage to the environment? On Uthaka's own (very extensive) papers, the envisaged rehabilitation is not absolute. The contamination would, in its own words in its answering affidavit be "manageable". Its Vice – President stated that "*these potential consequences and impacts are also evaluated to determine the likelihood of any of them occurring and all of the relevant potential consequences and impacts, as identified, were assessed to present an acceptable level of risk. This assessment was done on the basis of site-specific features and characteristics*". (my emphasis)

6.20 Once the existence of a risk had been conceded, the answer to what might be an "acceptable risk" to a mining company, would in all probability not be the same for a trustee of a protected environment. Adv Oosthuizen SC who appeared for Uthaka together with Adv Rust, urged the court not to take a "precautionary approach". Such an approach, in environmental protection disputes, is applicable "*where due to unavailable scientific knowledge there is uncertainty as to the future impact of the proposed development. Water is a precious commodity, it is a natural resource that must be protected for the benefit of the present and future generations*". See: Fuel Retailers Association v Director: Environmental Management, Mpumalanga 2007 (6) SA 4 (CC) at [98].

6.21 Uthaka argues that, "*to err on the side of caution thus means to insist on mitigation measures despite uncertainty and not to veto development because of uncertainty*". However, in the Fuel Retailers – case (above) the former chief justice, then Ngcobo J held as follows at [102]: "*The role of the courts is especially important in the context of the protection of the environment and giving effect to the principle of sustainable development. The importance of the protection of the environment cannot be gainsaid. Its protection is vital to the enjoyment of the 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*".

6.22 In my view, in applying the above injunctions in respect of risk which may be "manageable" or not, but has the potential to impact on a protected area, without absolute scientific assurance about the extent of the risk or its "manageability", the duty of the court is to err on the side of protection of possible harm and to prevent the occurrence of harm which may be irreversible.

6.23 In short, the present case demonstrates that, where there is, in the context of a protected environment, a reasonable prospect that the excision of an area from such an environment may be reversed, the risk of damage to such an environment should be avoided until the certainty as to the excision has been obtained.

[7] Balance of convenience

7.1 Even though the approach of the court in this matter should be as indicated above, the balance of convenience of the parties should still be considered.

7.2 In the context of this case, this means weighing up the inconvenience which may be caused for Uthaka if the commencement of mining operations, in

respect of which it has already invested millions of Rands, is yet again delayed for an indefinite period, against the environmental concerns referred to above.

7.3 A factor which ties in with Uhtaka's inconvenience, is the contention that, should it not immediately commence mining operations, for which it has set out the various prospective steps in a Gantt Chart, it is at risk of losing its mining licence. The initial steps relating to the construction of the surface infrastructure of the proposed mine, are to some extent, "non-invasive". For this reason, the applicants have, in reply, conceded that Uthaka may be permitted to commence with the "innocuous" part of the initial commencement of mining operations, namely the pegging of the surface areas. This should result in the licence not lapsing and/or allowing Uhtaka to obtain the necessary extensions for such commencement if needs be. This permission has been contained in the order.

7.4 The other relevant "balance of convenience" to be considered is that of the twelfth respondent, The Voice. It represents the local community situated within the Dr Pixley Ka Isaka Seme Local Municipal District. The community consists of some 87 611 people in 25 448 households. Only 44,2% of this population is economically active. The community is a poor one with 73,4% of the households having a monthly income of less than R 3 500.00. Should the mine become operational, 8464 new employment opportunities might be created. Of these, 5 356 will be "direct". A number of adjunct SMME's will in all probability also become established as a result of mining operations.

7.5 Clearly, the mining operations would be beneficial to the community in an economic sense. In a sense, this represents the perpetual tension between

the consequences of human intervention in nature for its own sake and the conservation of nature itself. The granting of an interdict would, however, only be temporary in nature. If it lapses after the terms thereof have been fulfilled or otherwise disposed of, it will only have resulted in a delay of the mining operations. Whilst bearing in mind that such a delay will cause an extension of the period of hardship for the community, their position has been, sad as it is, in existence for many years. The mine will also not immediately and in miraculous fashion, transform the community and solve or alleviate all its problems. Although this court always views circumstances of hardship with empathy, the reality of the situation is that, if the MEC's decision is reviewed and set aside, the mine will have to be established either elsewhere or only in those circumstances or on those conditions as the Ministers may determine after the reconsideration contemplated in the MEJCON – judgment The "convenience" of the community, or rather the "inconvenience" in having a possible beneficial consequence to their wellbeing postponed, is a factor which this court has taken into account when the order referred to in paragraph 1 above has been granted as one of the "interrelated" considerations. See Erikson Motors (welkom) Ltd v Protea Motors, Warrenton 1973 (3) SA 685 (A) at 691 D – E. These considerations or "inconvenience" were, however, outweighed by the others already discussed. These considerations will again feature, should any reconsideration by the Ministers, as referred to in the MEJCON – judgment, take place.

[8] Conclusion

In conclusion, having weighed up all of the above factors and the evidence produced by the parties, I find that

- This court has jurisdiction to hear the matter;

- The matter merited a hearing on the urgent court roll;

- The applicants have shown, at least prima facie at this stage, that they have a reasonable prospect of success in the pending matters but, in particular, in respect of the review of the MEC's decision to excise the properties in question from the MPE. The appeals and reviews do not appear to have been launched frivolously or vexatiously and there appear to be serious review and appeal issues which need to be decided;

- The applicants do not have an alternate remedy available;

- There is a well-grounded apprehension of harm to the environment which does appear to have the real prospect of being irreversible, albeit that the extent of the irreversibility may be in dispute;

- The allowing of the pegging of areas as contained in Uthaka's Gantt Chart should be allowed as an amelioration of some of Uthaka's fears regarding the validity of their environmental authorization required for the continued existence of their mining right;

- In the exercise of my discretion and having considered the various aspects pertaining to the balance of convenience of all concerned parties, an interim interdict is justifiable;

- In the exercise of my discretion further, The Voice, having regard to the impecunity of its constituents, should not be saddled with a costs burden. Save as aforesaid, I find no cogent reason why costs should not otherwise follow the event.

[9] The order

As already indicated, the order had, of necessity and due to the grounds of urgency stated in the application, been granted last week on 23 March 2021. For the sake of good order and clarity, it is again repeated here:

1. It has been directed that this matter be heard on an urgent basis in terms of rule 6(12).

2. The first respondent ("Uthaka") is interdicted and restrained from conducting any mining activities and mining-related operations (including any activities preparatory, ancillary or incidental to mining, including without limitation any fencing, cutting or clearing of vegetation, any establishment of roads, any contruction or installation of buildings, infrastructure or equipment and any drilling, excavation, digging, removal of soil, coal, ore or any mineral) ("mining activities") save for the survey pegging of the surface infrastructure boundary as contemplated as activity 1 in the first respondent's Gantt Chart, and the wetlands demarcation pegging of the aproved plan, contemplated as activity 2 in the Gantt Chart, on the properties listed in annexure 'A' to the Applicants' Notice of Motion ("the properties") unless and until, the following has taken place -

2.1 The final determination of the following reviews and appeals –

2.1.1 The applicants' appeal in this division under case number A155/19 in terms of section 149 of the National Water Act 36 of 1998;

2.1.2 The applicants' judicial review in this division under case number 86261/19 of the water use licence;

2.1.3 The applicants' internal statutory appeal against the approval of Uthaka's Environmenatal Management Programme and any judicial review proeedings instituted in respect of that appeal decision;

2.1.4 The applicants' judicial review of the environmental authorisation (in the Mpumalanga Division of the High Court, Mbombela under case number 1390/18);

2.1.5 The applicants' judicial review of Uthaka's mining right (in this division under case number 73278/15);

2.1.6 The applicants' judicial review of the dicision by the Gert Sibande District Joint Municipal Planning Tribunal to approve the rezoning of Portion 1 of the farm Yzermyn 96 HT from agriculture to mining, and the Municipal Appeal Authority of the Dr Pixley Ka Isaka Seme Local Municapality's confirmation of the approval of that decision (in the Mpumalanga Division of the High Court, Middleburg under case number 1344/20); and

2.1.7 The applicants' judicial review of the MEC's decision to exclude the properties from the Mabola Protected Environment, which review application must be instituted within 30 days after the MEC has delivered his reasons for said decision;

2.1.8 The reconsideration by the Ministers of Environmental Affairs and Mineral Resources of Uthaka's application for written permission to conduct mining in terms of section 48(1)(b) of NEMPAA, as ordered by Davis J in his judgment under case number 50779/2017, should Uthaka need or persist in seeking such permission.

2.2 The grant of the following authorisations and permissions –

2.2.1 A valid mining right, in respect of which the period for commencement has been duly extended in terms of section 25(2)(b) of the Mineral and Petroleum Resources Development Act 28 of 2002 ("MPRDA");

2.2.2 The exhaustion of the statutory procedures in terms of section 54 of the MPRDA vis-à-vis the owner of portion 1 of Yzermyn 96 HT and any occupier of that land; and

2.2.3 The fulfillment of all relevant conditions laid down in statutory authorisations, including those imposed by the Water Tribunal.

3. The first respondent is ordered to pay the costs of this application including the costs of two counsel, such costs in respect of the applicants' instructing attorneys and senior counsel to be payable in terms of section 32(3)(a) of the National Environmental Managmement Act 107 of 1998.

N DAVIS
Judge of the High Court
Gauteng Division, Pretoria

Date of Hearing: 17 March 2021

Judgment delivered: 30 March 2021

APPEARANCES:

For the Applicant:	Adv T. J Bruinders SC together with Adv K Hardy
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For the 1st Respondent:	Adv M.M Oosthuizen SC together with Adv J Rust
Attorney for the 1st Respondent:	Fasken Attorneys, Pretoria
For the 12th Respondent:	Adv H van der Vyver
Attorney for the 12th Respondent:	Ayoob Kaka Attorneys, Johannesburg