



the federation for a sustainable environment

**Belfast Office**  
**Box 201**  
**Belfast**  
**1100**  
**Cell: 083 986 4400**  
**Fax: 086 514 6085**  
**(Reg. No. 2007/003002/08)**  
**NPO NUMBER 062986-NPO**  
**PBO No. (TAX EXEMPT) 930 039 506**

**OBJECTION TO THE GRANTING OF A WATER USE LICENSSE TO ATHA AFRICA'S  
YZERFONTEIN MINE**

**OBJECTOR: FEDERATION FOR A SUSTIANABLE ENVIRONMENT**

**Date: 27/6/2016**

1. The Federation for a Sustainable Environment (**FSE**) hereby objects to the granting of a water use license to the Yzerfontein mine.
2. It is submitted that this objection is lodged timeously. In a recent North Gauteng High Court case the Judges held as follows:

*[38]Timeously* is not defined in the NWA. In its dictionary definitions, the word can mean, according to the Oxford English Dictionary, *sufficiently early, in good time; promptly; in a well timed or opportune manner*. It was submitted by counsel for the respondents that a word used in a statute is

generally presumed to bear the same meaning throughout. This is so but it is by no means an inflexible rule.<sup>9</sup> From that starting point, counsel argue that *written objection* in s 148(1)(f) should bear the meaning it carries in s 41(4)(a)(ii).

---

[39] But the premise on which the argument of counsel for the respondents is founded is flawed: the word *timeously* is not used in s 41(4)(a)(ii). The proper enquiry, as I see it, is not what *written objection* means in the context of s 148(1)(f) but what *timeously lodged a written objection* means in that context. And indeed to interpret s 41(4)(a)(ii) to mean that an objection lodged after a date specified in the subsection was *not timeous* in the sense that such an objection should *ipso facto* be excluded from consideration would be constitutionally offensive. As was correctly conceded in argument by counsel for the respondents, *a written objection submitted after the specified date but in good time to be dealt with during the decision making process must be taken into account It seems strange to conclude that one and the same written objection may be timeous for the purposes of the s 41 decision making process (the single purpose for which it was solicited) but untimeous for the purposes of s 148(1)(f).*<sup>1</sup>

3. The area in question falls within the Gert Sibande District Municipality. The Spatial Development Plan (SDP) for this municipality states that the “sensitive upper catchments and wetlands in the Wakkerstroom area” “... ***must be actively protected, managed and enhanced so as to ensure that they are not degraded by mining, forestry, agricultural and human settlement activities.***” According to the SDP, compatible

---

<sup>1</sup> Escarpment Environment Protection Group and Another v Department of Water Affairs and Others, In Re; Escarpment Environment Protection Group and Another v Department of Water Affairs and Others, In Re; Escarpment Environment Protection Group and Another v Department of Water Affairs and Others (A666/11, 4333/12, 4334/12) [2013] ZAGPPHC 505 (20 November 2013)

economic activities, including forestry and tourism related activities, must be allowed to continue in these areas.

4. The area in question also falls within the Dr Pixley Ka Isaka Seme Local Municipality (PKISLM). Under the heading, “Environmental Management Framework” in this municipality’s Integrated Development Plan (IDP), it is stated that the municipal area is “characterised by many wetlands and pan systems, and is an important water catchment area. Many endemic and threatened grass species occur in the area and of particular significance are the areas around Wakkerstroom and Luneburg... The PKISLM is also strategically important because it contains the sources of three river systems, including an important source of water for the Gauteng region.”
  
5. The area is also recognised for its unique sensitivity within the Mpumalanga Tourism and Parks Agency (MTPA) Conservation Plan (C-Plan) as approved by the Provincial Cabinet and also the latest Mpumalanga Biodiversity Sector Plan. (MBSP)
  
6. It is common cause that this mine will be situated in a critical biodiversity area. The above places an obligation on the applicant to submit information to overcome the risk averse and cautious approach.<sup>2</sup> The aforesaid simply means that due to the sensitivity of the environment, the information before the decision maker must be such that the consequences can be assessed with sufficient knowledge and confidence in order to ensure that no damage or degradation to the environment will occur. The MTPA is of the opinion that the impact of this application is such that irreplaceable damage will occur to the Critical Biodiversity areas. They have also stated that if these critical areas cannot be protected then the environment cannot be sustainably protected.

---

<sup>2</sup> NEMA s2(4)(vii) 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;** and

7. The whole question of need and desirability thus comes into play due to the fact the even though there may be a need for coal, the desirability of mining coal in such a sensitive area , whilst billions of tons of coal are available in South Africa not overlain by sensitive areas such as these can still be mined. Simply put there is no need to mine coal in sensitive areas such as these when sufficient coal is still available elsewhere which is not overlain by such sensitive landscapes.
8. The National Environmental Management Act, Act 107 of 1998 (NEMA) Principles (principles), set out in section 2 of NEMA, apply to the actions of all organs of State and must serve as guidelines to any organ of state when exercising a function or when taking any decision in terms of any statutory provision concerning the protection of the environment, including provisions of the NWA.<sup>3</sup> They must furthermore guide the interpretation, administration and implementation of the NWA.<sup>4</sup>

The following principles are relevant to this objection:

- development must be socially, environmentally and economically sustainable
- that the disturbance of ecosystems and loss of biological diversity are avoided, or, where they cannot be altogether avoided, are minimised and remedied
- that pollution and degradation of the environment are avoided, or, where they cannot be altogether avoided, are minimised and remedied
- that the development use and exploitation of renewable resources and the ecosystems of which they are part do not exceed the level beyond which their integrity is jeopardised
- 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

---

<sup>3</sup> Section 2(1)(c) of the National Environmental Management Act, 1998 (NEMA)

<sup>4</sup> Section 2(1)(e) of NEMA

- that negative impacts on the environment and on people's environmental rights be anticipated and prevented, and where they cannot be altogether prevented, are minimised and remedied
- environmental management must be integrated, acknowledging that all elements of the environment are linked and interrelated, and it must take into account the effects of decisions on all aspects of the environment and all people in the environment by pursuing the selection of the best practicable environmental option<sup>5</sup>
- responsibility for the environmental health and safety consequences of a policy, programme, project, product, process, service or activity exists throughout its life cycle
- decisions must take into account the interests, needs and values of all interested and affected parties, and this includes recognising all forms of knowledge, including traditional and ordinary knowledge.
- the social, economic and environmental impacts of activities, including disadvantages and benefits, must be considered, assessed and evaluated, and decisions must be appropriate in the light of such consideration and assessment
- the environment is held in public trust for the people, the beneficial use of environmental resources must serve the public interest and the environment must be protected as the people's common heritage.
- the costs of remedying pollution, environmental degradation and consequent adverse health effects and of preventing, controlling or minimising further pollution, environmental damage or adverse health effects must be paid for by those responsible for harming the environment

---

<sup>5</sup> "best practicable environmental option" means the option that provides the most benefit or causes the least damage to the environment as a whole, at a cost acceptable to society, in the long term as well as in the short term;

- sensitive, vulnerable, highly dynamic, or stressed ecosystems, such as coastal shores, estuaries, wetlands and similar ecosystems require specific attention in management and planning procedures, especially where they are subject to significant human resource usage and development pressure

In the *Maccsand*<sup>6</sup> case the Constitutional Court stated that that :

*[5] As one of the laws passed to promote section 24 of the Constitution,(8) one of the MPRDA's purposes is to protect the environment by ensuring ecologically sustainable development of mineral and petroleum resources while at the same time promoting economic and social development.*

It is clear that the NWA also falls within that ambit when having regard to the Preamble<sup>7</sup>, Purpose of the Act<sup>8</sup> and Public Trusteeship<sup>9</sup>.

---

<sup>6</sup> *Maccsand (Pty) Ltd v City of Cape Town and Others* (CCT103/11) (CC) [2012] ZACC 7; 2012 (4) SA 181 (CC); 2012 (7) BCLR 690 (CC) (12 April 2012)

<sup>7</sup> PREAMBLE

Recognising that water is a scarce and unevenly distributed national resource which occurs in many different forms which are all part of a unitary, inter-dependant cycle;

Recognising that the ultimate aim of water resource management is to achieve the sustainable use of water for the benefit of all users;

Recognising that the protection of the quality of water resources is necessary to ensure sustainability of the nation's water resources in the interests of all water users; and

<sup>8</sup> 2. Purpose of Act

The purpose of this Act is to ensure that the nation's water resources are protected, used, developed, conserved, managed and controlled in ways which take into account amongst other factors—

(a) meeting the basic human needs of present and future generations;

(d) promoting the efficient, sustainable and beneficial use of water in the public interest;

(e) facilitating social and economic development;

(g) protecting aquatic and associated ecosystems and their biological diversity;

(h) reducing and preventing pollution and degradation of water resources;

<sup>9</sup> 3. Public trusteeship of nation's water resources

(1) As the public trustee of the nation's water resourced the National Government, acting through the Minister, must ensure that water is protected, used, developed, conserved, managed and controlled in a sustainable and equitable manner, for the benefit of all persons and in accordance with its constitutional mandate.

(2) Without limiting subsection (1), the Minister is ultimately responsible to ensure that water is allocated equitably and used beneficially in the public interest, while promoting environmental values

The Constitutional Court went on and stated that:

*[9] NEMA was enacted as a general statute that co-ordinates environmental functions performed by organs of state.<sup>(16)</sup> It also provides for “co-operative, environmental governance by establishing principles for decision-making on matters affecting the environment”.<sup>17</sup> As is evident from the long title, NEMA was passed to establish a framework regulating the decisions taken by organs of state in respect of activities which may affect the environment.<sup>18</sup> It lays down general principles which must be followed in making decisions of that nature.*

9. The interaction between NEMA and the NWA is thus clear and the interaction is of a very important nature in any application that may significantly affect the environment. In terms of s41(2)<sup>10</sup> of the NWA it may be required that any application must comply with the NEMA regulations. In this case, where there is significant impact on very sensitive resources and the discretionary “may” must be interpreted as a “must”.
  
10. The cumulative impact of the potential damage must also be assessed on the basis of other operations approved in areas of Critical Biodiversity Areas. This information is simply not before the decision maker in order to make an assessment of the cumulative impact. This is especially so in view of the fact that the MTPA has stated that it cannot ensure a sustainable environment without being able to protect these CBA's.

---

<sup>10</sup> 41 (3) A responsible authority may direct that any assessment under subsection (2)(a)(ii) must comply with the requirements contained in regulations made under sections 24(5) and 44 of the National Environmental Management Act, 1998 (Act No. 107 of 1998).  
(Section 41(3) substituted by section 3(a) of Act 27 of 2014)

11. It is our submission that the basic information, as collected by the experts, is simply not of sufficient quality to make any reasonable impact assessment, much less and assessment as required in this sensitive environment.

11.1. In the Wetland Assessment: page 185

### 2.3. Study Limitations

No detailed wetland assessment was undertaken in the greater area to be impacted upon by the underground mining and associated cone of depression from the dewatering activities or the groundwater contamination plume (WSP, 2013a) ; · No detailed information on the AYCP was available until recently, and the boundaries of the lease, underground mining and surface infrastructure areas changed during the course of this Assessment. Consequently, field surveys for the wetland investigation for the new surface infrastructure area and proposed coal discard area were undertaken in winter. The winter field investigation limited the use of vegetation indicators for the assessment; · **The source of water for the wetlands identified within the study area and within the greater cone of depression is unknown** (WSP, 2013a).

11.2. In the Geohydrological study on page 69:

The predicted post-closure decant rate, i.e. groundwater outflow at ground surface, **is strongly dependent on the poorly defined regional recharge rate and local hydraulic conductivities and therefore burdened with a great uncertainty.**

### 8.6.2. Impact Rating

The potential post closure impacts of decant from the underground mine voids on the groundwater quality are:

Highly likely to occur.

Widespread beyond site boundary (regional). Localised if mitigated by treatment of decant.

☐ Long-term, with substantial increases of pollutant concentrations in surface waters beyond closure. Depending on mitigation measures, i.e. treatment system, limited increases of pollutant concentrations beyond closure.

☐ The intensity of the impact is likely to be a substantial deterioration in the ambient surface water quality if not mitigated by treatment of decant. Depending on the treatment method, the impact can be mitigated/reduced to a minor to moderate intensity.

11.3. In the wetland assessment on page vi

Based on the findings of this study, it is the opinion of the ecologists that the project is regarded as having extremely high impacts; unless it is considered economically feasible to treat the decant water post-closure until water quality stabilizes, which could take many decades, to pre-mining water quality standards in such a way as to support the post closure land use, which is envisaged to be protected wilderness.

12. The applicant thus submitted supporting documentation that states that the source of water for the wetlands are unknown and that the decant volume, quality or period of flow is and as such cannot make financial provision for the impact. This is simply a fatal flaw since the sustainability of the project is dependent on the applicant proving that it has the financial means to mitigate any impact.

13. Even if they can show that the water post closure can be mitigated, then the possible impact on the wetlands, since the source of the water is still unknown. It is acknowledge that even supplying the water back to the wetlands, and on the premise that it would not simply flow back into the workings due to the cone of depression, will still have negative impacts.<sup>11</sup>

---

<sup>11</sup> EMP viii

14. In view of the above, taking into account the gaps in basic information and the extreme sensitivity of the area, we object to the granting of the water use license.

A handwritten signature in black ink, appearing to read 'Kos Pretorius', written on a light-colored background.

Kos Pretorius ( FSE Director)