

Court Upholds Environmental Interests: The Mabola Protected Environment

Mining and Environmental Justice Community of South Africa and Others v MEC for Agriculture, Rural Development, Land and Environmental Affairs and Others (1322/2021) [2024] ZAMPMBHC 48 (18 July 2024)

INTRODUCTION

In the latest development of a decade-long legal battle over proposed mining in the Mabola Protected Environment (“the Area”), the Mbombela High Court ruled that the Area must remain protected and that mining activities may not proceed.¹ The judgement was delivered in 2024 and follows six previous court judgements also preventing mining activities in the Area, including two decisions by the Constitutional Court dismissing applications for leave to appeal previous judgements preventing the mining activities.

The Area spans roughly 8 700 hectares of grasslands and wetlands in Mpumalanga and was declared a Protected Area in terms of section 28 of the National Environmental Management: Protected Areas Act² (“the NEMPAA”). The Area was given protected status because it supports important biodiversity and forms part of one of South Africa’s key water source areas.

The Member of the Executive Council for Agriculture, Rural Development and Environmental Affairs in Mpumalanga (“the MEC”) excluded four properties from the Protected Area to allow coal mining by Uthaka Energy, a subsidiary of an Indian-based mining and energy company (“the decision”).

The organisations that challenged the Mec’s decision included leading environmental groups, such as BirdLife South Africa, the Endangered Wildlife Trust, the Federation for a Sustainable Environment, and the Association for Water and Rural Development, amongst others.

For reasons grounded in policy, law and science, the Court reviewed the decision of the MEC based on eight grounds of review as contemplated in Section 6(2) of the

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Promotion of Administrative Justice Act.³ In its analysis, the Court highlighted the Area as a vital source of biodiversity as it contains at least 21% of the country’s plant species—nearly a quarter of which are threatened—as well as many rare and unique species. It also plays an essential role in protecting the long-term supply of food, water, fuel, and timber, while supporting key ecosystem services such as air purification, and pollination. Mining activities in the Area would have negative and broad-reaching effects including acid mine drainage contamination, using a large amount of water, and a significant loss of biodiversity.

The grounds of review accepted by the Court, which ultimately led to the decision being declared unlawful and invalid, are summarised below:

1. Section 48 of the NEMPAA requires the Minister’s consent, which was not granted

Section 48 of the NEMPAA requires written permission from both the Ministers of Environmental Affairs and Mineral Resources, as custodians of protected environments, to consider, with scrutiny, the interests of local communities and environmental principles as per section 2 of the National Environmental Management Act⁴ (“the NEMA”). Since the Area is classified under Irreplaceable Critical Biodiversity Areas, the decision was contrary to Section 48(1)(b) of the NEMPAA.

2. Circumvention of Gauteng High Court judgement

In 2018, the Pretoria High Court (Gauteng Division) set aside an earlier decision by the Ministers that had allowed mining to proceed. The Court ruled that no mining could take place until certain key requirements were met.

These included:

- Approval of Uthaka Energy’s environmental management programme,
- Approval of a water use licence, and
- Approval of a formal management plan for the Area, as required by section 39(2) of NEMPAA.

A management plan outlines how a protected area must be preserved and managed to achieve the purpose for which it was created. The MEC made the decision without the requisite management plan. This plan is an important tool that Ministers and the MEC must consider when exercising their discretion in terms of section 48(1)(b) of the NEMPAA, particularly when assessing the environmental impact.

The Court found that the MEC made the decision without ensuring that these requirements had first been satisfied, and in doing so effectively bypassed the earlier Pretoria High Court judgement. As a result, the decision was unlawful.

3. Science policy and law

The Court found that the MEC did not properly consider the scientific evidence, environmental policies, and legal framework protecting the Area. Instead, the decision focused mainly on the potential economic benefits of mining. The scientific reports before the MEC highlighted the serious environmental harm that coal mining could cause, including damage to biodiversity and threats to clean water sources.

The Area was declared protected specifically to safeguard its irreplaceable biodiversity and to ensure the long-term protection of water and other essential ecosystem services.

4. Precautionary principle

Section 2(4) of the NEMA sets out that sustainable development requires the consideration of all relevant factors, including that a risk-averse and cautious approach is applied, which considers the limits of current knowledge about the consequences of decisions and actions.

This 'precautionary principle' applies to the actions of all organs of State that may significantly affect the environment. Where there is uncertainty about the impacts of the action or where the risk of harm to the environment is high, every environmental decision maker must "err on the side of caution and protection of the environment".

In casu, there was uncertainty and inadequate information regarding the impact of the proposed mine on biodiversity and ecological considerations. The nature and extent of the acid mine drainage and damage to the wetlands as a result of the mine would be unknown. Therefore, the court had to err on the side of caution and protection of the environment.

5. Failure to adhere to principle of co-operative governance

The MEC was obliged to act in accordance with the principles of co-operative governance as codified in several legislation, such as section 32 of the NEMPAA, the objects of the Intergovernmental Relations Act, and sections 40(2) and 41 of the Constitution. Such principles require the MEC to consult and co-ordinate with other affected and interested governmental spheres and Ministers.

The Court emphasized that the principle of legality requires the exercise of public power to be in compliance with the law and within such boundaries, including rationality and the non-arbitrary exercise of power.

6. Bias or reasonably suspected of bias

According to the Court, the MEC showed clear bias in his decision making, or at the very least, a reasonable suspicion of bias. He did not act in a neutral manner and publicly associated himself as being in favour of the establishment of the mine, such as being quoted in a City Press Newspaper article as committed to the opening of the mine as it would boost the economy.

7. Failure to consider the impacts of mining

The Court noted that although the mine would generate 576 employment opportunities when fully operational, the social and economic benefits of mining for the local community does not outweigh the disadvantages of the proposed mine. This is because the impact on the water resources is long term, far-reaching and devastating on both the local community and other downstream water users, as well as the biodiversity and natural grassland in the area.

The Court noted that the economic benefits to the local community are outweighed by the importance of the protection of the environment as a whole.

8. Failure to consider South Africa's international responsibilities

The MEC did not make reference to the nation's international responsibilities, as required by section 2(4)(n) of the NEMA, in the reasons provided for the decision.

Such responsibilities include the Ramsar Convention on Wetlands, the Migratory Species Convention, the Convention on Biological Diversity, and the United Nations Framework Convention.

CONCLUSION

As emphasised in the judgment, section 24 of the Constitution guarantees everyone the right to an environment that is not harmful to their health or well-being, and requires the environment to be protected for the benefit of present and future generations. The Court's decision to preserve the Area reinforces the importance of sustainable development and environmental protection, particularly at a time when the world is faced with climate change, deforestation, and the loss of natural resources.

¹*Mining and Environmental Justice Community of South Africa and Others v MEC for Agriculture, Rural Development, Land and Environmental Affairs and Others* (1322/2021) [2024] ZAMPMBHC 48 (18 July 2024).

²The National Environmental Management: Protected Areas Act 57 of 2003.

³The Promotion of Administrative Justice Act 3 of 2000.

⁴The National Environmental Management Act 107 of 1998.



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