HEY ADMINISTRATOR, DID YOU CONSULT WITH THE PUBLIC AND STAKEHOLDERS ON THAT DECISION?

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A win for communities and the environment, but yet another hurdle for an ailing mining sector. The impact of the recent judgments involving *Atha–Africa Ventures (Pty) Ltd* should have investors raising eyebrows and taking a more judicious look at their prospective mineral resource plans.

In Mining and Environmental Justice Community Network of South Africa and others VS Minister of Environmental Affairs and others (Case No: 50779/2017) ("**Atha–Africa Ventures Case**"), the High Court of South Africa decided on the case brought by a coalition of eight civil society organisations (the "**Applicants**"). The Applicants challenged a range of authorisations, which led to the permission of an underground coal mine in a strategic water resource area and protected environment. The Mabola Protected Environment ("**MPE**") was declared under the Protected Areas Act in 2014 by the Mpumalanga provincial government as part of the declaration of more than 70 000 hectares of protected area in the Mpumalanga grasslands.

The Applicants sought to have the decision of the Minister of Environmental Affairs ("**First Respondent**") and the Minister of Mineral Resources ("**Second Respondent**") to permit coal mining activities in the MPE reviewed and set aside. At the centre of the dispute is the prospective coal mining company, Atha-Africa Ventures Proprietary Limited ("**Atha**"). In terms of section 48 (1)(b) of the National Environmental Management: Protected Areas Act No 57 of 2003 ("**NEMPAA**"), a holder of a license may conduct commercial prospecting, mining, exploration, production or related activities in a Protected Environment, with the written permission of the Minister and Cabinet Member responsible for mineral resources. The written permission in this instance was provided to Atha in the form of a letter, signed by the First and Second Respondents on 20 August 2016 and 21 November 2016, respectively, with the MEC copied in as a recipient. Attached to the letter were the "permission and reasons for the decision," which were similarly signed.

It was common cause that the decisions of the Ministers constituted administrative acts and therefore, the decision was reviewable by a court in terms of the Promotion of Administrative Justice Act No 3 of 2000 ("**PAJA**"). The Applicants relied on thirteen grounds of review in which they brought this application, *inter alia* these grounds were (i) transparency, the Applicants contended that the decision was not taken in a transparent manner and almost in a clandestine fashion, to which the court agreed, (ii) the MPE management plan, the applicants contended that the decisions could not be reasonably taken in the absence of a final management plan for the MPE. The court restated "importance and status of a management plan in respect of a protected area in terms of the content of the NEMPAA", (iii) the Applicants contended that the decision making authorities ought to be risk adverse and cautious when making decisions around "sensitive, vulnerable, highly dynamic or stressed ecosystems,

such as...wetlands", to which the court agreed. With respect to the correct administrative process to be followed by the Applicant and authorities in considering an application envisaged under sections 48(1)(b) of NEMPAA the court stated that in order to purposively give effect to the envisaged environment within a manner in which the Ministers are obliged to exercise their discretions, sections 48(1)(b) and 48(4) of the NEMPAA, should be interpreted as follows:

"despite the fact that a person may have obtained all the necessary authorisations required in terms of all other applicable statutory provisions in order to lawfully conduct mining activities on a certain portion of land, should that land fall within protected environment as contemplated in NEMPAA, then such a person would, in addition (own emphasis added) need to obtain the written permission of both the Ministers of Environmental Affairs and Mineral Resources to do so. In considering the request for such permission, the Ministers shall act as custodians of such protected environment and with a strict measure of scrutiny take into account the interests of the local communicates and environmental principles referred to in section 2 of NEMA."

The court went on to highlight that NEMPAA is a "distinct statute, dealing with the environmental management of protected areas, it has supremacy in terms of section 7 of NEMPAA over other conflicting statutory provisions when it deals with protected environments and the State's trusteeship thereof". The court recognised this as placing 'distinctive duties' on the Ministers to apply their minds before granting such permission and criticised the Ministers for making their decisions based on the fact that decisions had been taken by other officials in terms of other provisions before them.

The court upheld the application brought by the Applicant's, rendered the decision made by the Ministers in terms of section 48 of NEMPAA reviewable and the permission given to Atha was remitted to the First and Second Respondents for reconsideration. Furthermore, the court made the remittance subject to the following directives: (i) the administrator has to comply with sections 3 and 4 of PAJA, (ii) the administrator has to take into account the interests of the local communities and the environmental principles referred to in section 2 of NEMA, (iii) the administrator has to defer any decisions in terms of section 48(1)(b) of NEMPAA, until finalisation of the various appeals relating to the granting of authorisations by other officials, and lastly (iv) the administrator may not consider the granting of permission to conduct commercial mining in MPE in terms of section 48(1)(b) of NEMPAA until a management plan for the MPE has been approved by the MEC.

Protected Environments are also considered to be Protected Areas under NEMPAA and are afforded the same protection as special nature reserves, national parks, nature reserves, world heritage sites and marine protected areas. The court inadvertently made the grant of the NEMPAA permission, subject to the finalisation of seven other potential permissions, including the conclusion of their respective administrative processes. Moreover, the court raised the bar for administrators when assessing such request for written permission under NEMPAA, requiring them to "apply a strict measure of scrutiny taking into account local communities and the NEMA Section 2 Principles". However, the courts emphasis on transparency in decision-making by administrators, is in our view the real victoryfor the Applicants and a firm caution for administrators.

The Atha–Africa Ventures case is a reminder of the overarching role transparency plays in administrative justice. Atha thought they had legitimate NEMPAA permission in place, and probably on the back of this permission made certain costly investment decisions. When scrutinised, it was found that the written permission did not pass the muster of section 3 of PAJA, being a procedurally fair administrative action. Unfortunately, for Atha and any aspirants mining right applicants, this case inadvertently endorses that over and above the regulatory labyrinth that needs to be mastered to commission a prospecting and/or mining project, applicants also need to keep authorities accountable for their decision making.

The absence of such accountability and resultant transparency, only costs the applicant in the end. In order for such accountability to be instilled, applicants will need to be educated on what elements of a decision, make it a procedurally fair administrative decision. Long gone are the days of simply ticking boxes, as lack of transparency, as is evident from the Atha–Africa Ventures case, can become the achilles heel in an authorisations process.

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