**THE SUPREME COURT OF APPEAL OF SOUTH AFRICA**
MEDIA SUMMARY OF JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

**From:** The Registrar, Supreme Court of Appeal

**Date:** 29 May 2025

**Status:** Immediate

***The following summary is for the benefit of the media in the reporting of this case and does not form part of the judgments of the Supreme Court of Appeal***

*Endangered Wildlife Trust and Another v Director-General (Acting) Department of Water and Sanitation and Another* (Case no 1165/2023) [2025] ZASCA 69 (29 May 2025)

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Today the Supreme Court of Appeal (SCA) handed down judgment in an appeal by two environmental non-profit organisations, the Endangered Wildlife Trust and the Federation for a Sustainable Environment (the appellants), against an order of the Gauteng Division of the High Court, Pretoria (High Court), sitting as court of appeal in terms of s 149(1) of the National Water Act 36 of 1998 (NWA). The High Court dismissed the appellants' appeal against a decision of the Water Tribunal (the Tribunal), which upheld a decision by the first respondent, the Acting Director General of the Department of Water and Sanitation (DG) to issue to the second respondent, Atha-Africa Ventures (Pty) Ltd, a water use licence under the NWA (the licence). The SCA dismissed the appeal with costs.

The second respondent is the owner of Yzermyn Underground Coal Mine (the mine) situated outside Wakkerstroom, in the Gert Sibande District Municipality, Mpumalanga. In 2011 it acquired coal prospecting rights under the Minerals and Petroleum Resources Development Act 28 of 2002 (MPRDA) to an area of 8360 hectares, covering 12 privately-owned farms, in Mpumalanga. In 2013 it was granted a mining right under the MPRDA in respect of only five farms.

The second respondent requires the licence to commence mining. To that end it engaged various experts and obtained several specialist reports, including a hydrological, socio-economic, geohydrology impact, and a biodiversity baseline and impact assessment. It also obtained a Numerical Groundwater Model Report and conducted a public participation process as part of the application for the licence. These assessments informed the licence conditions, including periodic reviews and a requirement that the second respondent must submit a closure plan five years before the mine is decommissioned.

In July 2016 the DG issued the licence, valid for 15 years, to the second respondent. The licence authorises specified water-use activities in relation to the mining to be conducted. In 2016 the appellants appealed the DG's decision to issue the licence, to the Tribunal. They claimed that

the DG failed to consider the effect of the proposed water use on the water resource and other water uses; that the DG failed to authorise certain water uses associated with the closure of the mine; that the consent of the owner of a farm regarding the use of underground water had not been obtained as required by s 24 of the NWA; and that the DG failed to apply environmental principles in the National Environmental Management Act 107 of 1998 (NEMA).

In 2019 the Tribunal dismissed the appeal. It concluded that the findings and scientific reviews by the appellants' experts were unsubstantiated, and 'demonstrated in evidence to be shallow and lacking by way of ground truthing'. By contrast, the Tribunal found that scientifically sound methods were used in the second respondent's wetland and hydrological studies; that the appellants' claim that the DG had not authorised water uses associated with the closure of the mine had no merit; that there was good reason to dispense with the owner's consent in the circumstances; and that the environmental principles in the NEMA did not preclude the issuance of the licence. The Tribunal added further conditions to the licence, directing the second respondent to provide proof of financial provision for the post-closure treatment of contaminated water.

The appellants appealed to the Tribunal's decision to the High Court in terms of s 149(1) of the NWA, which permits an appeal only on a question of law. They noted 12 appeal grounds, but proceeded with only five, namely that the Tribunal failed to consider the strategic importance of the mining area for water security and biodiversity; the licence should not have been granted without the landowner's consent as envisaged in s 24 of the NWA; the Tribunal erred in finding that the licence provides for the treatment of contaminated water after closure of the mine; and the Tribunal erred in its application of the precautionary principle in the NEMA. The High Court dismissed the appeal with costs. The SCA granted the appellants special leave to appeal.

Before the SCA, the appellants raised an additional argument, namely that the High Court did not give an independently reasoned judgment, which was indicative of bias and infringed their right to a fair trial under the Constitution, because large parts of the second respondent's heads of argument were incorporated in that court's judgment. The SCA rejected this argument on the ground that it was opportunistic and baseless. The appellants had not met the requirements for bias, more specifically, a reasonable apprehension by a reasonable person that the court might be biased. The SCA held that the very purpose of heads of argument is to convince a court that the tribunal below was incorrect; that there is nothing wrong with incorporating portions of a party's heads of argument in a judgment; and that the most flattering judgments incorporate heads of argument. Something more is required; something that points to the reasonable apprehension of a predetermined closed mind on the part of the judge in the adjudication of the case itself.

The remaining appeal grounds, the SCA held, did not raise questions of law, save for the proper construction s 24 of the NWA. This section permits a licence to be issued if the landowner consents to the use of underground water on its land, or if there is a good reason to do so. The SCA found that the appellants' interpretation that this means that there must be a good *public* reason, was opportunistic, strained and untenable. Their real complaint was that the owner had not consented, which was a question of fact. The SCA found that the Tribunal's conclusion that there was a good reason to issue the licence, was justified. The remaining grounds of appeal, namely the failure: to consider the strategic importance of the mining area; to provide for the treatment of contaminated water after closure of the mine; and to apply the precautionary principle, were all questions of fact based on the evidence before the Tribunal. Thus, they could not form the subject of an appeal in terms of s 149(1) of the NWA, which is confined to a question of law. Consequently, the appeal was dismissed.

As regards costs, the SCA found that the appellants were represented by senior and junior counsel; that the s 149(1) appeal had no merit; that it was pursued vexatiously; and that it constituted an abuse of court process. The appellants raised 12 grounds of appeal, dressed-up as questions of law. The bias point was opportunistic and stillborn. The appellants lodged the s 149(1) appeal, despite an application, which is pending in the High Court, to review both the DG's decision to issue the licence and the Tribunal's decision dismissing their appeal. That review is based on the same factual grounds as these proceedings. The appellants pursued the s 149(1) appeal regardless of the consequences – the inconvenience to and exorbitant costs that would be incurred by the respondents. They filed a record comprising 26 volumes and some 5000 pages. The second respondent was forced to oppose the proceedings in the High Court and the SCA, to retain its licence, at huge costs. The DG's costs are ultimately paid by taxpayers. The appellants have issued five court applications against the second respondent. It has spent US$ 61 million only on specialist studies, to secure the necessary authorisations for mining, and US$ 40 million for equity and prospecting rights. The SCA stated that opponents who are harassed by the worry and costs of vexatious litigation, are entitled to protection. Further, valuable and scarce judicial resources have been wasted on a misconceived appeal. And the members of the local community who support the proposed mine are in dire need of upliftment and jobs, have been prejudiced by the appellants' conduct in launching this appeal.

For these reasons, the appellants failed to show why they should not be held to the same standards of conduct as any other litigant. They were ordered to pay the costs of the appeal, including the costs of two counsel where so employed.

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