THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 1165/2023

In the matter between:

ENDANGERED WILDLIFE TRUST	**FIRST APPELLANT**
FEDERATION FOR A SUSTAINABLE ENVIRONMENT	**SECOND APPELLANT**

and

DIRECTOR-GENERAL (ACTING) DEPARTMENT OF WATER AND SANITATION	**FIRST RESPONDENT**
ATHA-AFRICA VENTURES (PTY) LTD	**SECOND RESPONDENT**

Neutral citation:	*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)
Coram:	SCHIPPERS, HUGHES, WEINER and SMITH JJA and VALLY AJA
Heard:	19 February 2025
Delivered:	29 May 2025

Summary: Statutory appeal – s 149(1) of National Water Act 36 of 1998 (NWA) – against decision of Water Tribunal – confined to question of law – what the law is on certain issue – High Court incorporating heads of argument into judgment – no reasonable apprehension of bias established – meaning and effect of s 24 of NWA – sole question of law – remaining issues questions of fact – appeal dismissed – costs – vexatious litigation – abuse of court process – environmental organisations ordered to pay costs.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Baloyi-Mere AJ and Nyathi J sitting as court of appeal in terms of s 149(1) of the National Water Act 36 of 1998):

The appeal is dismissed with costs, including the costs of two counsel where so employed.

JUDGMENT

Schippers JA (Hughes, Weiner and Smith JJA and Vally AJA concurring)

[1] The appellants are non-profit environmental organisations. The second respondent is the owner of Yzermyn Underground Coal Mine (the mine) situated outside Wakkerstroom, in the Gert Sibande District Municipality (the Municipality), in Mpumalanga. On 7 July 2016 the first respondent, the Acting Director General (DG) of the Department of Water and Sanitation (the Department), issued a water use licence to the second respondent in terms of Chapter 4 of the National Water Act 36 of 1998 (NWA). The licence, which is valid for 15 years, authorises the second respondent to undertake specified water use activities associated with thermal coal mining to be conducted at the mine.

[2] On 1 December 2017 the appellants noted an appeal, in terms of s 148(1) of the NWA, to the Water Tribunal (the Tribunal) against the DG's decision to issue the water use licence. The Tribunal dismissed the appeal on 22 May 2019.

[3] On 12 June 2019 the appellants appealed the Tribunal's decision to the Gauteng Division of the High Court, Pretoria (the High Court), in terms of s 149(1) of the NWA. On 11 May 2023 the High Court (Nyathi J and Baloyi-Mere AJ) dismissed the s 149 appeal with costs. The High Court refused the appellants leave to appeal. The appeal is before us with special leave of this Court.

The basic facts

[4] The basic facts are uncontroversial and can be briefly summarised. In 2011 the second respondent acquired coal prospecting rights under the Minerals and Petroleum Resources Development Act 28 of 2002 (MPRDA) to an area of 8360 hectares outside Wakkerstroom, Mpumalanga. These rights were previously held by BHP Billiton, Ingwe Colliery and Bonengi Mining Services. The prospecting area covered 12 privately-owned farms. After an initial exploration process, a second exploration process was undertaken from July to November 2013.

[5] After the exploration, in 2013 the second respondent was granted a mining right under the MPRDA in respect of only five farms. These farms consist of agricultural, grassland and forestry areas, and vacant land with rivers and wetlands. The main land uses include agriculture, conservation and cultivation.

[6] The proposed underground coal mining area is extensive – some 1200 hectares. Initially the surface infrastructure would have covered over 50 hectares, but this was reduced to approximately 22.4 hectares. The mine is anticipated to produce 2.2 million tons of coal per annum, with an estimated lifespan of 15 years.

[7] If mining commences, the mine will use the bord and pillar method. This entails the removal of large areas of coal-containing ore, by leaving in place 'pillars' of coal to hold up the roof of the underground mine. Two adits (a horizontal passage to give access from the surface) will be sunk to access the

underground coal seams. The mining project will involve underground drilling and blasting, the extraction, crushing, screening and stockpiling of coal product, and the transportation of the coal product for sale.

[8] Initially the second respondent engaged the services of WSP Environmental (Pty) Ltd (WSP) to conduct a social and environmental impact assessment. WSP produced several specialist reports in 2013. These include a hydrological assessment; socio-economic assessment; geohydrology impact assessment; and a biodiversity baseline and impact assessment.

[9] Similar specialist studies were conducted by Scientific Aquatic Services (Pty) Ltd (SAS) on behalf of the second respondent. In February 2013 SAS produced reports containing a faunal, floral and wetland ecological assessment; and an environmental assessment and authorisation for the proposed discard dump as part of the mining project. The initial SAS reports were revised in February 2014. SAS also produced a Wetland Ecological Assessment in June 2014, which was revised in May 2015. The SAS reports were revised because the DG on 9 January 2014, informed the Department of Mineral Resources of several concerns relating to the mine and why the proposed mining could not be supported.

[10] Subsequently WSP was replaced by EcoPartners, an environmental assessment practitioner, which revised the relevant reports in accordance with concerns raised by the Department of Environmental Affairs regarding the second respondent's application for an environmental authorisation. As a result, substantial changes were made to the mine design, layout and surface footprint.

[11] The second respondent appointed XMP Consulting (Pty) Ltd (XMP) to furnish a report on the economic impacts of the mine. In October 2013 XMP produced a report entitled, 'Review of the South African Coal Mining Industry'.

[12] The application for the water use licence was compiled by Kara Nawa Environmental Solutions, and submitted on 10 March 2014. On 10 April 2014 the DG advised the second respondent that the application was incomplete; that several reports and studies had to be submitted or revised; and that an Integrated Water and Waste Management Plan (IWWMP) was required. This was done between April 2014 and March 2015.

[13] In June 2014 EcoPartners appointed SAS to conduct, inter alia, a wetland ecological assessment. In August 2014 EcoPartners produced a downstream water usage report, and appointed Delta H Water Systems Modelling, which produced the Yzermyn Underground Coal Mine – Numerical Groundwater Model Report (the Delta H report), drafted by Prof Kai Witthüser.

[14] On 18 March 2015 the second respondent submitted a revised water use licence application to the Department, together with its IWWMP, based on new studies and design modifications in accordance with the directions from the DG. On 22 April 2015 the Department informed the second respondent that the public participation process which had been carried out 'was not specific on the water use activities as per the NWA'. The Department required an advert to be placed in one newspaper for a period of 60 days for a public participation process in terms of s 40(4) of the NWA. The second respondent was also directed to submit the mining permit, mining right and a social and labour plan as part of its application.

[15] On 19 June 2015 the second respondent caused a notice of a public participation process concerning the application for a water use licence, to be published in three local newspapers in terms of s 41(4) the NWA. The notice, published in English, Afrikaans and isiZulu, informed the public of their right to submit comments between 19 June 2015 and 20 August 2015. A draft of the IWWMP was published with the notice.

[16] On 27 August 2015 the second respondent submitted the revised IWWMP and application for the licence to the Department. The first appellant responded to this in a one-page letter dated 30 September 2015, stating that it opposed the application.

[17] On 20 April 2016 the DG advised the second respondent that the formal requirements for the application of the water use licence had been met. A Record of Recommendations was compiled on 5 July 2016. The second appellant apparently objected to the application in a letter dated 27 June 2016. However, the Department denied receipt of that letter. The DG approved the application on 7 July 2016.

[18] On 18 November 2016 the appellants commissioned various experts to review the second respondent's technical reports (to which they had been given access on 3 August 2015 already). These specialist review studies obviously were not before the DG when the decision to grant the water use licence was taken. The appellants furnished no reasons why the specialist studies had been commissioned after the licence had been issued. Neither were the specialist studies nor other studies which were in possession of the appellants and their attorneys, Centre for Environmental Rights (CER), provided to the second respondent's consultants, prior to the hearing of the appeal in July 2018. Some documents co-authored by the CER itself and reports by other civil society organisations published in 2011, which the CER used in its advocacy work, had to be introduced after an application to the Tribunal by the appellants to reopen their case in October 2018.

[19] On 15 December 2016 the CER filed a notice of appeal against the DG's decision to grant the water use licence. The CER was also involved as an interested and affected party in the application for the licence.

[20] Nearly a year later, on 1 December 2017 the appellants amplified their grounds of appeal. They substantially changed several of their arguments and abandoned some that had become indefensible in the light of the specialist reviews which they had obtained.

[21] The grounds of appeal, in sum, were these:

(a) The DG failed to consider the likely effect of the proposed water uses on the water resource and on other water users, required by s 27(1)*(f)* of the NWA. The DG also failed to give effect to the efficient and beneficial use of water in the public interest, required in terms of 27(1)*(c)* of the NWA.

(b) The DG failed to authorise two water uses associated with the closure of the mine, namely the discharge of water containing waste into a water resource (s 27(1)*(f)* of the NWA), and the disposal of waste in a manner which may detrimentally impact on a water resource (s 27(1)*(g)* of the NWA).

(c) The DG failed to apply the precautionary management principle in s 2(4)*(a)*(vii) of the National Environmental Management Act 107 of 1998 (NEMA), required by s 2(1) of the NEMA.

(d) The DG's decision to grant an exemption in terms of regulation 4(b) of Government Notice 704 in respect of water uses associated with the mine, was unjustifiable.

(e) The DG failed to consider the true socio-economic impact of the water uses, if authorised, required by s 27(1)*(d)* of the NWA.

(f) The DG failed to give effect to the right to procedurally fair administrative action as contemplated in s 3 and s 4 of the Promotion of Administrative Justice Act 3 of 2000 (PAJA).

(g) The DG failed to consider material information relating to the strategic importance of the water use, required by s 27(1)*(i)* of the NWA.

[22] Before the Tribunal the appellants adduced evidence by three witnesses, namely Mr Andrew Johnstone, a hydrogeologist; Dr Le Maitre, a researcher with expertise in ecosystem services assessment and mapping; and Ms Christine Colvin, a hydrogeologist.

[23] The DG presented the evidence of Ms Hasina Aboobaker. She is the environmental officer who prepared the Record of Recommendations for the issuance of the water use licence.

[24] Mr Praveer Tripathi, the second respondent's Senior Vice President, testified that it acquired the mine as a result of an investment conference in India at which the South African government sought investments. The second respondent paid US$40 million for the equity in Bongeni. The entire process to commission specialist studies to secure the necessary authorisations and permits had cost the second respondent US$61 million. Over three years the company had expended over US$700 million in respect of the mine. Mr Tripathi said that the mine would create some 500 jobs and that the coal to be mined would be traded in domestic and international minerals markets.

[25] The second respondent called four expert witnesses, namely Mr Peter Smit, an environmental assessment practitioner in mining management; Dr Frederik Botha, a hydrogeologist who specialises in managing the geological design and planning of mines; Prof Witthüser, a specialist hydrogeologist in water systems modelling; and Mr Stephen Van Staden, a wetland ecologist who co-authored the SAS reports. Mr Thabiso Nene, a community leader of the area in which the mine is located, also gave evidence on behalf of the second respondent. The Tribunal heard evidence over seven days.

The Tribunal's decision

[26] The Tribunal dismissed the appeal. Its findings may be summarised as follows. The first ground of appeal was unsubstantiated. The evidence of

Prof Witthüser and Dr Botha and the detailed Delta H and SAS reports showed that scientifically sound methods were used in the wetland and hydrogeological studies. The DG considered the recommendations, some of which were negative. This led to the imposition of several conditions in the water use licence, requiring the second respondent to take measures to prevent pollution, monitor underground water pollution and report thereon. The second respondent adduced expert evidence on the prediction of decant and the proposed mitigation measures in the form of a modularised water treatment plant. The appellants' claim that no provision was made for a water treatment plant post-mining, was unfounded. The DG properly considered s 27(1)*(c)* and *(f)* of the NWA, imposed appropriate conditions to address the adverse impacts of the authorised water uses and the decision to issue the water use licence was reasonable, fair and rational.

[27] The Tribunal found that the appellants' claim that the DG failed to authorise two water uses associated with the closure of the mine, had no merit. These water uses related to the discharge of water containing waste into a water source (s 21*(f)* of the NWA) and the disposal of waste in a manner which may detrimentally impact on a water resource (s 21*(g)*). The evidence demonstrated that there was no data nor accurate information on the nature and volumes of water required to be treated after closure of the mine. The water use licence contains a condition requiring the second respondent to prepare a closure plan five years before decommissioning of the mine, when such volumes and flows would be clear. Further, the licence provides for a review of the conditions every two years, which authorises a variation of existing conditions or the imposition of new ones; and s 52 of the NWA provides for 'earlier renewal or amendment' of a licence, which would include the authorisation of water uses for post-mining activities.

[28] Concerning the alleged failure to apply the precautionary principle in the NEMA, it was common ground that the mining operations would result in a

degree of contamination of ground water and surface water. What was disputed was the degree of such contamination and what would constitute sufficient mitigating measures. The Tribunal stated that for the precautionary principle to apply, it had to be demonstrated that the mine poses a threat of serious or irreversible environmental damage; that there is scientific uncertainty regarding such damage; that the measures taken should not go beyond what is needed; and that the principle does not necessarily prohibit development.

[29] Coal mining, the Tribunal said, is a centuries old industry and the methods, impacts and environmental dynamics around this activity were generally known and well established. The scientific evidence submitted by the experts on both sides showed a clear understanding of the potential risks of coal mining to water resources. What was however uncertain, was the volume and quality of decant post-mining, because mine data is obtainable only once mining commences, when mining plans and post-closure rehabilitation plans are designed.

[30] The Tribunal stated that the precautionary principle should be considered together with other principles in s 2(4) of the NEMA, particularly those relating to sustainable development. The appellants' case was based on the GCS Review findings and other expert reviews, which were demonstrated to be shallow and lacking in ground truthing. However, the respondents did not provide absolute levels of comfort. Based on the evidence adduced, the Tribunal found that the DG had considered the precautionary principle and that its application did not preclude the issuance of the water use licence. It said that the principle does not require unequivocal scientific certainty before decisions are taken, otherwise no development would be authorised.

[31] The Tribunal found that the DG's decision to grant an exemption in terms of regulation 4(b) of Government Notice 704 in respect of water uses associated with the mine, was necessary for mining to take place. The appellants placed no

information before the Tribunal to demonstrate why the granting of the exemption was unjustified. The basis for this ground of appeal was the GCS Review which the Tribunal found, was scientifically flawed.

[32] Regarding the fifth appeal ground – the failure to consider the socio-economic impact of the water uses – the appellants submitted that documents before the DG did not 'report objectively and fully on the possible effects of the proposed colliery on people living in the area'; that a significant number of jobs were not going to be created; and that most of the people work on surrounding farms, and derive a limited income from farm jobs and social grants. The Tribunal rejected these submissions for the following reasons. Part of the appellants' arguments were based on *ex post facto* reviews that were not placed before the DG when the impugned decision was taken. They placed no evidence nor information before the Tribunal to demonstrate the alleged negative socio-economic impacts resulting from the grant of the licence. In fact, the appellants conceded that they presented no evidence by local communities nor farmers, and that they focus on 'the wider interests of water resources in the country as a whole'.

[33] The Tribunal noted that s 27(1)*(d)* of the NWA required it to consider not only the socio-economic impact of authorising water uses, but also the consequences of a failure to authorise such uses. In contrast to the appellants, the respondents provided evidence on both these issues. And Mr Nene's evidence that the mining area is characterised by poor families earning low wages, which is supplemented with bags of mealie meal from farmers, went unchallenged. He said that any number of jobs from the mining company would be better than work on farms, which kept the community impoverished.

[34] The Tribunal also had regard to s 27(1)*(f)* of the NWA and held that there were sufficient detailed reports on the impacts of water uses on the wetlands,

underground water, springs and aquifers in the mine site; and that the reserve determination was a measure of assurance that there would be sufficient water for ecological needs after granting the water use licence. The Tribunal accordingly found that there would be a positive socio-economic impact on the local community. The estimate of 70 jobs during construction and 576 jobs during the operational phase would make a substantial difference to the livelihoods of the community, which had not been enriched by current water uses.

[35] Although counsel for the appellants had indicated that they were not persisting with the challenge based on procedural unfairness, the Tribunal nonetheless found that it had no foundation. The second respondent conducted a public participation process as required by s 41(4) of the NWA. The appellants had registered as interested and affected parties. The CER was provided with revised reports, a letter explaining why wetland offsetting was not possible and a table of final mitigation measures, after it sought information under the Promotion of Access to Information Act 2 of 2000.

[36] The Tribunal found that the DG's alleged failure to consider 'the strategic importance of the water uses to be authorised', as required by s 27(1)*(i)* of the NWA; and that the exploitation and use of natural resources must be responsible and equitable as envisaged in s 2(4)*(a)*(v) of the NEMA. The Tribunal found that this challenge lacked evidence and was based on vague submissions. It held that s 27(1)*(i)* had to be read with s 27(1)*(h)*, which requires the responsible authority to consider 'investments already made and to be made by the water user', about which the appellants said very little. Further, the life of the mine is 15 years, which is relatively short compared to other large-scale coal mining operations in the country.

[37] The appellants added a further ground of appeal midway through the hearing, namely that the respondents had not obtained the consent of the owner

of the farm Zoetfontein, required by s 24 of the NWA. This, despite the fact that the licence was issued subject to the condition that the second respondent would not be allowed to commence underground mining, until it provides the Department with a signed copy of a consent form (DW902) by the owner of Zoetfontein, declaring that the licensee has lawful access to that property and may carry out the water use activity related to the licence.

[38] Section 24 provides that if consent cannot be obtained or is withheld, the decision-maker may still grant the water use licence 'if there is good reason to do so'. The second respondent informed the owner in writing of the public participation process and discussed it with him. Thereafter, nothing was heard from the owner. Having regard to these facts, and the considerations in s 27(1) of the NWA, the Tribunal found that there were good reasons to dispense with the owner's consent as contemplated in s 24 of the NWA.

[39] The Tribunal dismissed the appeal. It confirmed the water use licence and imposed three additional conditions. First, the second respondent is required, in terms of clause 14.1 of the water use licence, to provide the DG with proof of financial provision made in terms of legislation other than the NWA. Second, the DG is required, within 60 days of the Tribunal's decision and before commencement of mining, to review the adequacy of the financial provision by the second respondent and if necessary, require the second respondent to provide further financial security in accordance with s 30 of the NWA. And third, the two-yearly review of the water use licence in terms of clause 4.1 thereof, must include a focused review by the DG of the adequacy of financial or budgetary provision made for post-closure water treatment and remediation, consistent with prescribed monitoring and auditing reports on possible future impacts.

The appeal to the High Court

[40] In their notice of appeal in terms of s 149(1) of the NWA, the appellants set out 11 grounds of appeal, which they said are all questions of law. Some five months later they added a twelfth ground. However, the appellants persisted only with five grounds of appeal in the High Court.

[41] In sum, the appeal grounds were these:

(a) Ground 1: The Tribunal failed to consider the strategic importance of the mining area for water security and biodiversity.

(b) Ground 2: The Tribunal erred in holding that there were good reasons to grant the water use licence in the absence of the landowner's consent, contrary to s 24 of the NWA.

(c) Ground 3: The Tribunal erred in finding that the appellants had a duty to place before it, evidence regarding socio-economic impacts. The statutory framework places that duty on the second respondent as the applicant for a water use licence.

(d) Ground 4: The Tribunal erred in finding that the licence provides for the treatment of contaminated water after closure of the mine. It ought to have found that the DG could not in the licence, legally make provision for the treatment of contaminated water post-closure of the mine at the end of the licence period.

(e) Ground 5: The Tribunal erred in its interpretation and application of the precautionary principle in s 2(4)*(a)* of the NEMA, including the precautionary principle in s 2(4)*(a)*(vii). It ought to have found that the application of the precautionary principle had been established, and that it militated against the granting of the water use licence.

[42] The High Court dismissed the appeal, with costs. Its judgment may be summarised as follows. The NEMA principles do not preclude any adverse impacts on the environment. Neither do these principles constitute a checklist

with which a development must comply. Rather, adverse impacts should be avoided, failing which they should be minimised or remedied; and the NEMA principles constitute normative guidelines.

[43] The court stated that the precautionary principle traditionally applies in a case where there is scientific uncertainty about the existence or extent of the risks or consequences of a decision or an action; and that it applies where such risks or consequences are known, but there is scientific uncertainty about the efficiency of the mitigation measures in preventing or reducing the risk or consequences. The court held that the precautionary principle had been met in this case.

[44] The High Court agreed with the Tribunal's finding that the wetland hydrological studies were scientifically defensible; and that the second respondent had demonstrated compliance with the relevant provisions of the NWA and that the necessary precautionary measures had been put in place. It accepted that in deciding the matter, the Tribunal sought to harmonise the prevention of pollution and environmental degradation with the promotion of economic and social development.

The issues

[45] This appeal raises the following issues:

(a) Did the High Court fail to give an independently reasoned judgment?

(b) The nature and ambit of an appeal under s 149(1) of the NWA.

(c) Did the Tribunal fail to consider the strategic importance of the mining area for water security and biodiversity?

(d) The proper construction of s 24 of the NWA.

(e) Did the Tribunal err in failing to find that there was no provision for post-closure treatment of contaminated water?

(f) Did the Tribunal err in its application of the precautionary principle?

The alleged failure to give an independently reasoned judgment

[46] The appellants submit that the High Court's failure to give an independently reasoned judgment gives rise to a reasonable apprehension of bias, and infringed their right to a fair trial enshrined in s 34 of the Constitution.[1] This submission is based solely on the contention that the judgment consists largely of the written heads of argument of the second respondents' counsel, which the High Court copied *verbatim*; and it shows 'essentially no sign of original or independent application or reasoning'.

[47] It is then submitted that a judgment which simply adopts one party's heads of argument, does not give the other party a fair hearing or a decision that reflects the necessary independence and impartiality implicit in s 34 of the Constitution, insofar as it applies to courts. The appellants' right to have a dispute resolved, it is submitted, contemplates a deliberative process where the evidence, the law and the parties' competing contentions are heard, understood and subjected to critical scrutiny; and which produces an outcome through a process of independent reasoning.

[48] The test for bias is settled. There must be (i) a reasonable apprehension that the judicial officer might (not would) be biased; (ii) by a reasonable person in the position of the litigant; (iii) which is based on reasonable grounds; and (iv) the apprehension must be one that a reasonable person would (not might) have.[2] The Constitutional Court has held that a litigant who alleges judicial bias or its apprehension bears a formidable burden, because of the presumption of impartiality by virtue of the constitutional oath of office that judicial officers are

[1] Section 34 of the Constitution provides:
'**Access to courts**
Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.'
[2] *S v Roberts* 1999 (4) SA 915 (SCA) paras 32-34; *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 1999 (4) SA 147 (CC) para 30; *Bernert v Absa Bank Ltd* [2010] ZACC 28; 2011 (4) BCLR 329 (CC); 2011 (3) SA 92 (CC) (*Bernert*) para 29; C Hoexter and G Penfold *Administrative Law in South Africa* 3 ed (2021) at 618-619.

required to take, as well as the nature of the judicial function.[3] The effect of this presumption 'is that a judicial officer will not lightly be presumed to be biased'.[4] The test for bias posits a double requirement for bias: both the person who apprehends bias and the apprehension itself must be reasonable.[5]

[49] There is even a greater burden on the appellants in this case – a decision by a court comprising two judges. The allegation that the court failed to give an independently reasoned judgment, is opportunistic and baseless. The appellants ignore the court's order in their favour issued against the second respondent. In its heads of argument in the High Court, the second respondent made the following submissions. The CER had a direct and substantial interest in the matter, and the appellants had advanced a partisan and misleading case in the proceedings before the Tribunal and the High Court. The appeal was an abuse of process to advance their agenda against any form of coal mining. The appellants should pay the costs of the appeal on an attorney and client scale; and the CER, *de bonis propriis*.

[50] The High Court struck out these allegations as being vexatious. It ordered the second respondent to pay the costs of the appellants, the CER and various other public interest law centres admitted as *amici curiae*.

[51] This is a clear indication of the High Court's impartiality, and that it gave an independently reasoned judgment. It follows that the appellants' apprehension that the court might be biased, is not only unreasonable, but groundless – the court rejected submissions contained in the second respondent's heads of argument – the very document on which the appellants rely for their contention that they did not get a fair hearing, or a decision that demonstrates independence or impartiality on the part of the judges hearing the appeal.

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[3] *Bernert* fn 2 para 31.
[4] *Bernert* fn 2 para 33.
[5] *Bernert* fn 2 para 34.

[52] In any event, the allegation of bias has no substance. It is apparently based on the findings of the High Court in its judgment. It is submitted that they are taken *verbatim* from the second respondent's heads of argument; and that the appellants' appeal grounds 'received scant treatment, with no analysis to speak of'.

[53] The appellants are mistaken. The High Court set out the respective cases of the parties and outlined the issues, which the appellants alleged were questions of law. Nothing turns on the fact that these parts of the judgment were copied from heads of argument: there is no complaint that the court misconstrued the appellants' case or the issues it had to decide. Next, the court considered each issue, at the end of which it stated its conclusions. A plain reading of the judgment shows that the High Court's findings are sustainable on the evidence adduced before the Tribunal.

[54] The appellant's reliance on *Stuttafords Stores*,[6] is therefore misplaced. There, the Constitutional Court stated that furnishing reasons in a judgment prevents arbitrary decisions, and explains to the parties and the public at large – which has an interest in courts being open and transparent – why a case is decided as it is.[7] It is no authority for the submission that the incorporation of a portion of a party's heads of argument in a judgment, gives rise to a reasonable apprehension of bias.

[55] As stated by the Constitutional Court, the very nature of the judicial function requires judicial officers to be impartial.[8] Judges by training and experience, are adept at deciding cases by objective assessment of the facts. An appellate court must therefore decide whether objectively, the facts of the specific

[6] *Stuttafords Stores (Pty) Ltd and Others v Salt of the Earth Creations (Pty) Ltd* 2011 (1) SA 267 (CC) (*Stuttafords Stores*) paras 10 and 11.
[7] *Stuttafords Strores* fn 6 paras 10 and 11.
[8] *Bernert* fn 2 para 32.

case give rise to a reasonable apprehension that the judge might not have been impartial. If they do, the judge's decision must be set aside.

[56] In this case, the test is whether there is a reasonable apprehension by reasonable or fair-minded litigants that the two judges who decided this case might have closed their minds to the appellants' appeal grounds. This is a formidable burden. Extensive reliance on a party's heads of argument by itself,[9] does not amount to a reasonable apprehension of a lack of independence, partiality or what counts as bias for these purposes. After all, the very purpose of heads of argument is to convince a court of appeal that the court below either erred or was correct.[10]

[57] Further, there is nothing wrong with incorporating portions of a party's heads of argument in a judgment. In a paper on skeleton arguments in the United Kingdom, based on papers written by Lord Justice Mummery, Mr Justice Hunt and Mr Edmund Lawson QC, the authors say this:

'Advocacy is the art of persuasion through communication. The increased use of written advocacy is not, as some claim, the death of oral advocacy. A carefully drafted written submission can, when skilfully used at the oral hearing, enhance the impact of argument.

…

In short, your skeleton can be used as an implement of decision. That is what you should be aiming to achieve. The court, not the client or the solicitor or your opponent or you, is the "consumer". . . . When drafting a skeleton it is vital to bear in mind what you want the court to say when it gives judgment. *The most flattering judgments incorporate half the skeleton*.'[11]

[58] This shows that no right-thinking litigant could apprehend, let alone reasonably apprehend, that the mere incorporation of an argument in a judgment

[9] The the appellants say that the judgment 'for the most part', is a copy of the second respondents' heads of argument.
[10] L T C Harms 'Heads of Argument in Courts of Appeal' (2009) Vol 22 *Advocate* 3 at 20.
[11] Michel Kallipetis QC and Geraldine Andrews QC 'Skeleton Arguments: A Practitioners' Guide' *The Honourable Society of Gray's Inn* (August 2004). (Emphasis added.)

is indicative of bias, or an infringement of the right to a fair trial. Something more is required; something which points to a reasonable apprehension of a predetermined closed mind in the adjudication of the case itself. This, the appellants have not demonstrated and their attack on the High Court's order on this ground must fail.

The nature of an appeal under s 149(1) of the NWA

[59] Section 146 of the NWA establishes the Tribunal.[12] It states that the tribunal is an independent body which has jurisdiction in all provinces;[13] that it consists of a chairperson, deputy chairperson and as many additional members as the Minister responsible for water affairs considers necessary.[14]

[60] Appeals lie to the Tribunal in several situations identified in s 148(1) of the NWA. These include an appeal by the applicant or any other person who has timeously lodged a written objection, against a decision by a responsible authority on an application for a water use licence under s 41, or on any other application to which s 41 applies.[15]

[61] Section 148(4) states that the procedure for lodging, hearing and deciding appeals is contained in Part 2 of Schedule 6 to the NWA. Item 6(3) of Schedule 6 to the NWA provides:

'Appeals and applications to the Tribunal take the form of a rehearing. The Tribunal may receive evidence, and must give the appellant or applicant and every party opposing the appeal or application an opportunity to present their case.'

[62] Section 149 of the NWA provides:

'**Appeals from decisions of Water Tribunal**

(1) A party to a matter in which the Water Tribunal-

[12] Section 146(1) of the NWA.
[13] Section 146(2)*(a)* of the NWA.
[14] Section 146(3) of the NWA.
[15] Section 146(1)*(f)* of the NWA.

(a) has given a decision on appeal under section 148, may, on a question of law, appeal to a High Court against that decision; or

(b) has determined the liability for compensation or the amount of compensation under section 22 (9), may, on a question of law, appeal to a High Court against that determination.

(2) The appeal must be noted in writing within 21 days of the date of the decision of the Tribunal.

(3) The notice of appeal must-

(a) set out every question of law in respect of which the appeal is lodged;

(b) set out the grounds for the appeal;

(c) be lodged with the relevant High Court and with the Water Tribunal; and

(d) be served on every party to the matter.

(4) The appeal must be prosecuted as if it were an appeal from a magistrate's court to a High Court.'

[63] In the light of the plain wording, context and purpose of the NWA, an appeal under s 149(1) is confined to a question of law.[16] Section 149(1) grants the right of appeal from a decision of the Tribunal to a High Court 'on a question of law'; and requires the appellant to set out every question of law and the grounds of appeal, ie the grounds on which the question of law is based.

[64] This construction accords with the purpose of the NWA and the role of the Tribunal. The preamble to the NWA includes the recognition of the 'National Government's overall responsibility for and authority over the nation's water resources and their use'. Section 2 states that the purpose of the NWA 'is to ensure that the nation's water resources are protected, used, developed, conserved, managed and controlled' in ways that take into account amongst other factors, 'promoting the efficient, sustainable and beneficial use of water in the public interest'.[17] Section 3 vests the public trusteeship of the nation's water resources in the national Government, acting through the Minister, who 'is ultimately

[16] *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; [2012] 2 All SA 262 (SCA); 2012 (4) SA 593 (SCA) (*Endumeni*) para 18.

[17] Section 2*(d)* of the NWA.

responsible to ensure that water is allocated equitably and used beneficially in the public interest, while promoting environmental values'.[18]

[65] The Tribunal is a specialist body with expertise in engineering and water resource management. Section 146(4) of the NWA states that its members 'must have knowledge in law, engineering, water resource management or related fields of knowledge'. These members are nominated for appointment by the Judicial Service Commission and the Water Research Commission, who are required to consider the criteria set out in s 146(4) and the reputation and integrity of nominees when recommending them.[19] Section 147(1) provides that the Chairperson of the Tribunal may nominate one or more members to hear a matter, 'after having considered the necessary field of knowledge for the purposes of hearing a particular matter'.

[66] As to what constitutes a question of law, in *Media Workers Association,*[20] E M Grosskopf JA said:

'The term "question of law," the learned author states, is used in three distinct though related senses. In the first place it means a question which a Court is bound to answer in accordance with a rule of law - a question which the law itself has authoritatively answered to the exclusion of the right of the Court to answer the question as it thinks fit in accordance with what is considered to be the truth and justice of the matter. In a second and different signification, a question of law is a question as to what the law is. Thus, an appeal on a question of law means an appeal in which the question for argument and determination is what the true rule of law is on a certain matter. A third sense in which the expression "question of law" is used arises from the division of judicial functions between a Judge and jury in England and, formerly, in South Africa. The general rule is that questions of law in both the aforegoing senses are for the Judge, but that questions of fact (that is to say, all other questions) are for the jury.'

[67] Thus, a question of law within the meaning of s 149(1) of the NWA, is an appeal on a question as to what the law is on a certain issue, concerning water

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[18] Section 3(1) and (2) of the NWA.
[19] Item 3(5)*(a)* and *(b)* of Schedule 6 to the NWA.
[20] *Media Workers Association of South Africa and Others v Press Corporation of South Africa Ltd. (Perskor)* 1992 (4) SA 791 (AD); [1992] 2 All SA 453 (A) at 795D-F.

resource management. The court is required to 'ascertain the rule of law and to decide in accordance with it'.[21]

[68] The point may be illustrated with reference to *Magmoed*.[22] The case concerned the meaning of a 'question of law' as contemplated in s 319 of the Criminal Procedure Act 51 of 1977. One of the issues was whether as a matter of law, the trial court was correct in concluding that no unlawful common purpose on the part of any of the accused was established beyond reasonable doubt. In finding that this was not a question of law, Corbett CJ said:

'It is a genuine question of law *(a)* whether the evidence against an accused was such that there was a case to go to the jury or that there were grounds upon which the jury could legally convict the accused of the crime charged; or *(b)* whether the proven facts bring the conduct of the accused within the ambit of the crime charged. . . . As the quotation from the judgment of Feetham JA indicates, category *(b)* involves an enquiry as to the essence and scope of the crime charged by asking whether the proven facts in the particular case constitute the commission of the crime. This is clearly a question of law. But, in my opinion, a question of law is not raised by asking whether the evidence establishes one or more of the factual ingredients of a particular crime, where there is no doubt or dispute as to what those ingredients are.'[23]

[69] This construction is buttressed by two factors: (i) the Tribunal is a specialist body with expertise in a specific case, having regard to s 147(4) and (5) of the NWA; and (ii) its decisions constitute administrative action and are therefore reviewable under the PAJA. In fact, in 2019 the appellants launched an application in the High Court to review and set aside not only the Tribunal's decision, but also the DG's decision to issue the water use license to the second respondent. That application is pending.

[70] The above construction is further reinforced by the presumption of interpretation that the Legislature knows and has in mind the existing law when

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[21] *Media Workers Association of South Africa and Others v Press Corporation of South Africa Ltd ('Perskor')* 1992 (4) SA 791 (A) at 796G-H.
[22] *Magmoed v Janse van Rensburg and Others* 1993 (1) SA 777 (A) (*Magmoed*).
[23] *Magmoed* fn 22 at at 807G-808A.

passing legislation.[24] Although the NWA was passed prior to the coming into force of the PAJA, Parliament certainly would have been aware of the fundamental right to just administrative action in s 33 of the Constitution; and that the decisions of the Tribunal would be subject to review.[25] And this Court has held that decisions of the Tribunal constitute administrative action, which are reviewable under the PAJA.[26]

[71] In what follows, the so-called questions of law are considered. As is shown below, save for the meaning and effect of s 24 of the NWA, the s 149(1) appeal does not concern questions of law.

Ground 1: Failure to consider the strategic importance of the mining area

[72] The notice of appeal states that the Tribunal erred in considering the following as irrelevant: the mine area falls partly within the Enkangala Drakensberg Strategic Water Source Area, according to reports by the Council for Scientific and Industrial Research (CSIR) in 2013 and 2018; and the need for such areas to receive specific protection in decision-making. Then it is said that the question of law raised by this ground of appeal includes the following: whether the mine area falls within the Enkangala Drakensberg Strategic Water Source Area; the findings in the 2013 and 2018 CSIR reports; and whether the evidence of Ms Colvin and Dr Le Maitre constitute relevant factors as contemplated in the opening part of s 27(1) or s 27(1)*(a)*, *(b)*, *(c)*, *(d)*, *(e)*, *(f)*, *(g)*, *(i)* or *(j)* of the NWA.

[73] These are questions of fact dressed-up as questions of law. The appellants' complaint is essentially that the Tribunal failed to consider all relevant factors, including but not limited to the factors listed in s 27(1) of the NWA. The

[24] *Independent Institute of Education (Pty) Ltd v KwaZulu-Natal Law Society and Others* [2019] ZACC 47; 2020 (2) SA 325 (CC); (2020 (4) BCLR 495 (CC) para 38.
[25] Section 33(1) of the Constitution provides that 'Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.'
[26] *Makhanya NO and Another v Goede Wellington Boerdery (Pty) Ltd* [2012] ZASCA 205; [2013] 1 All SA 526 (SCA) para 31.

appellants submit that proposed mine area falls within a strategic water source area as appears from the 2013 and 2018 CSIR reports; that it also forms part of a river freshwater ecosystem priority area in the Atlas of National Freshwater Ecosystem Priority Areas in South Africa; and that the Tribunal failed to take these factors into account.

[74] Section 27(1) provides:

'**Considerations for issue of general authorisations and licences**

(1) In issuing a general authorisation or licence a responsible authority must take into account all relevant factors, including-

(a) existing lawful water uses;

(b) the need to redress the results of past racial and gender discrimination;

(c) efficient and beneficial use of water in the public interest;

(d) the socio-economic impact-

(i) of the water use or uses if authorised; or

(ii) of the failure to authorise the water use or uses;

(e) any catchment management strategy applicable to the relevant water resource;

(f) the likely effect of the water use to be authorised on the water resource and on other water users;

(g) the class and the resource quality objectives of the water resource;

(h) investments already made and to be made by the water user in respect of the water use in question;

(i) the strategic importance of the water use to be authorised;

(j) the quality of water in the water resource which may be required for the Reserve and for meeting international obligations; and

(k) the probable duration of any undertaking for which a water use is to be authorised.'

[75] In short, the appellants' case is that the evidence establishes that the proposed mine area falls within a strategic water source area and a river freshwater ecosystem priority area, and that the Tribunal erred in failing to take these factors into account. This is not a question of law.

[76] There is no doubt as to the nature and ambit of s 27(1) of the NWA.[27] On its plain wording, the factors listed in that provision do not constitute a closed list. The appellants' complaint is that the Tribunal erred in failing to take into account certain reports and the evidence they presented. It does not raise a question of law. In any event, the Tribunal found that Ms Colvin did not at all consider the water use licence issued to the respondent, and that her evidence was 'merely providing a context'. Dr Le Maitre, the Tribunal said, conceded that although it is not recommended, coal mining is not incompatible with the Strategic Water Source Areas Report.

[77] These are not questions of law. Therefore, the appeal cannot succeed on this ground.

Ground 2: the proper construction of s 24 of the NWA

[78] Section 24 provides:

'A licence may be granted to use water found underground on land not owned by the applicant if the owner of the land consents or if there is good reason to do so.'

[79] As noted by the Tribunal, the appellants raised the failure to obtain the consent of the landowner of the farm Zoetfontein, midway through the hearing. Although the proper construction of s 24 of the NWA is a question of law, the appellants' real complaint is that consent was not given. Their submission that there must be a 'public' reason to dispense with consent is both strained and untenable.

[80] It is settled that legislation must be interpreted having regard to its language, context and purpose.[28] As was held in *Hyundai Motor Distributors*,[29] a

[27] *Magmoed* fn 22 at 811C.
[28] *Endumeni* fn 16 para 18.
[29] *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others: In Re Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others* 2001 (1) SA 545 (CC)

statute must be construed in a manner that avoids limiting or infringing a right in the Bill of Rights, where this is possible.

[81] Section 1(3) of the NWA states:

'When interpreting a provision of this Act, any reasonable interpretation which is consistent with the purpose of this Act as stated in section 2, must be preferred over any alternative interpretation which is inconsistent with that purpose.'

[82] Section 2 sets out the purpose of the NWA as follows:

'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;
(b) promoting equitable access to water;
(c) redressing the results of past racial and gender discrimination;
(d) promoting the efficient, sustainable and beneficial use of water in the public interest;
(e) facilitating social and economic development;
(f) providing for growing demand for water use;
(g) protecting aquatic and associated ecosystems and their biological diversity;
(h) reducing and preventing pollution and degradation of water resources;
(i) meeting international obligations;
(j) promoting dam safety;
(k) managing floods and droughts,

and for achieving this purpose, to establish suitable institutions and to ensure that they have appropriate community, racial and gender representation.'

[83] The appellants submit that the purpose of the requirement of consent by the landowner is to ensure that the issuance of a licence to water users does not deprive the owners of land of the right to full enjoyment of their land; and that an applicant bears the onus to show that consent has been obtained. Then it is

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para 23; *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd and Another* [2008] ZACC 12; 2009 (1) SA 337 (CC); 2008 (11) BCLR 1123 (CC) para 46.

submitted that the requirement in s 24 that there must be a good reason to issue a licence, means a good *public* reason, ie only if the water use is for a public purpose or one in the public interest; and not for 'a private profit-making mining operation'.

[84] Section 24 of the NWA on its plain language, empowers a decision-maker to grant a licence to use underground water, either where the relevant landowner consents, or there is a good reason to do so. The jurisdictional requirement of a good reason, itself constitutes a limitation of the right to ownership in s 25 of the Constitution. Therefore, the appellants' reliance on *Hyundai Motor Distributors* is misplaced. This limitation is hardly surprising, given that the government is the public trustee of the nation's water resources, with the power to regulate the use and control of all water in the Republic.[30] These powers cannot be impeded by landowners withholding consent for a water use on, over or under their land. And the appellants do not suggest that s 24 is unconstitutional.

[85] In addition, the appellants wrench the requirement of a good reason in s 24 from its context. The section does not require a good *public* reason. Had that been a requirement, Parliament could have said so. Neither can the fact it should be a public reason, be implied. It is trite that words may be implied in a statutory provision only if effect cannot be given to the statute as it stands.[31]

[86] The appellants' construction is also at odds with the purposes of the NWA contained in s 2. These include ensuring that the nation's water resources are protected, used, developed, conserved, managed and controlled, taking into account not only the promotion of efficient, sustainable and beneficial use of water in the public interest, but also the facilitation of social and economic development.

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[30] Section 3(1) and (3) of the NWA.

[31] *Rennie NO v Gordon and Another NNO* 1988 (1) SA 1 (A) at 22E-F, affirmed in *Bernstein and Others v Bester and Others NNO* 1996 (2) SA 751 (CC) para 62.

[87] So, the only question is whether there was a good reason to grant the water use licence in the circumstances. Here too, the appellants misconstrue s 24. The notice of appeal states that the concept good reason requires 'that the water use in question is so compelling that it is in the public interest to override the landowner's statutory and constitutional rights'. But that is not so. Rather, 'good reason' means no more than that the decision to grant a licence to use underground water must have a sound basis, in the light of the purposes of the NWA, and the particular facts and circumstances of the case.

[88] Applied to this case, the Tribunal considered the following facts. The water uses that would impact the farm do not involve surface activities but relate to s 21*(c)* and *(i)* of the NWA, resulting from underground mining and voids under the farm. During the public participation process in 2015, the second respondent addressed a letter to the director of the company that owns the farm Zoetfontein, informing him of the application for the licence and inviting him to discuss the issue. Thereafter, the second respondent sent two further emails to the director, in which it confirmed that it had left a pack of documents for him to consider; that he received the documents; and that he was telephoned a few times to set up a meeting. The landowner did not respond to these letters and emails. The second respondent notified the DG accordingly.

[89] The Tribunal concluded that on its own, s 24 was not decisive of the grant of a water use licence. It held that there was good reason to dispense with the landowner's consent, having regard to the s 27(1) factors it had considered; the socio-economic considerations; and its assessment of the impact of the water use on wetlands, the farm Zoetfontein, and other affected properties.

[90] In these circumstances, it cannot be said that there was no good reason to issue the water use licence as contemplated in s 24 of the NWA. Consequently, the appeal on this ground also fails.

Ground 3: No provision for post-closure treatment of contaminated water

[91] In sum, this ground is set out in the notice of appeal as follows. The Tribunal erred in finding that the water use licence provides for the treatment of contaminated water after closure of the mine, because the second respondent is required to prepare a closure plan before the end of mining and would then have to apply for amendments to the licence to implement closure operations, in terms of ss 49 and 52 of the NWA; and the licence provides for review of its conditions every two years. The appellants say that post-closure treatment of contaminated water could not be provided for in the licence, since it is valid for only 15 years and there will be decant of contaminated water into wetlands and streams in 60-75 years' time. Then it is said that the questions of law raised by this ground are whether the Tribunal correctly interpreted ss 49, 52 and 28(2) of the NWA, and the conditions of the water use licence.

[92] This appeal ground also raises questions of fact dressed-up as questions of law. It appears from the Tribunal's findings that there is no reliance on either s 28 or s 49 for its conclusions on post-closure treatment of contaminated water.[32] This is unsurprising, since the appellants' case before the Tribunal as set out in its amplified grounds of appeal was 'the failure of the DG to authorise two water uses associated with the closure of the mine, namely the discharging of water containing waste into a water resource (s 21*(f)* of the NWA), and disposing of waste in a manner which may detrimentally impact on a water resource (s 21*(g)* of the NWA) **(new second ground of appeal)**'. This is not a question of law.

[93] As to this complaint, the Tribunal held that the evidence showed that there was neither data nor accurate information on the nature and volumes of water to be treated and disposed of post-closure of the mine. However, the licence contains

[32] Section 28 of the NWA sets out the essential requirements of licences, namely that a licence must specify the following details regarding its issuance: the licensee, the water use, the property area, the conditions, the licence period which may not exceed 40 years, and the review periods during which the licence may be reviewed, which must be at intervals of not more than five years. Section 49 authorises the review and amendment of a licence by a responsible authority.

conditions which require the second respondent to prepare a closure plan five years before the end of mining, when details of such volumes and flows would become clear and guide appropriate conditions.

[94] Having regard to the grounds of appeal, the Tribunal concluded that there were three broad issues that had to be determined, one of which was the concern relating to post-mining treatment of contaminated water. It found that once mining stops, water is likely to fill the void left behind and eventually cause the underground levels to rebound and decant onto the surface. On this issue there was a dispute as to whether sufficient provision was made for a water treatment plant post-closure; and whether financial provision was made to deal with this long-term impact.

[95] The Tribunal rejected the claim in the GCS Review and the evidence by the appellants' expert that no provision was made for a water treatment plant post-mining, as being 'clearly unfounded'. This plainly, is a question of fact. The Tribunal stated that the criticism in the GCS Review of the Delta H report, 'was demonstrated to be scientifically unsound'.

[96] As regards financial provision for the operation of the plant after the completion of mining – also a question of fact – the Tribunal found that this depended on the nature and volumes of the water to be treated and disposed of post-closure of the mine. It accepted the evidence of Prof Witthüser who used modelling to simulate decant rates; and testified that a more confident prediction of post-closure decant rates and quality could only be achieved based on site-specific monitoring and data gathered during the life of the mine. Prof Witthüser concluded:

'The confidence in predicting mining inflows and plume migration risks for later years or for the mine development can significantly be improved by observation data from earlier years and subsequent updates of the groundwater model.'

[97] This evidence went unchallenged. It is thus not surprising that it was never put to Prof Witthüser nor Mr Smit in cross-examination, that the DG should have made financial provision for the post-closure treatment of contaminated water but failed to do so. In any event, how was this supposed to be done in the light of the uncertainty regarding the nature and volumes of the water to be treated, and then, as the appellants would have it, for post-closure contaminated decant in 65-70 years' time? It is precisely because of this uncertainty – yet again, a question of fact – that the Tribunal imposed the conditions that the second respondent provide proof of financial provision made in terms of legislation other than the NWA; and that within 60 days of the Tribunal's decision and before mining commences, the DG must review the adequacy of budgetary provision and if necessary, require further financial security in terms of s 30 of the NWA.

[98] The appellants' challenge to Prof Witthüser's evidence was that the DG should not have issued the water use licence with a Class 1 classification of the potential post-closure impacts of decant, namely low confidence in terms of the Australian Groundwater Modelling Guidelines, because the mine is located in 'a highly sensitive area from a water point of view'. This challenge (which is also a question of fact) the Tribunal found, was not only scientifically unsubstantiated, but was also not established in evidence. It accepted Prof Witthüser's Class 1 classification and his evidence that the confidence in predicted mine inflows could significantly be improved by observation data from the earlier years of mining operations and subsequent updates of the groundwater model.

[99] On this issue the Tribunal came to the following conclusion:

'Having considered the evidence of Dr Witthüser on the interpretation and application of the *Australian Groundwater Modelling Guideline* (which is the only accepted international standard used to model groundwater flows), as well as noting that GCS Review was entirely based on a desktop review of selected aspects of the Delta-H Reports, these arguments are bereft of scientific substance on this aspect. Not in so many words, counsel for the Appellants

seemed to concede the factual and scientific in-exactitude of the GCS approach and conclusions.'

[100] Finally on this ground, the appellants ignore the evidence. First, Mr Smit testified that he was 95% confident in the steps taken to manage the risk of contaminated water escaping the mitigation measures put in place and causing pollution; that environmental management in relation to mining had improved; and that the pillar designs in current mines are such that they do not allow a mine to cave in, thereby causing a greater ingress of water. The appellants' submission that this evidence is worthless, because there is 'no concrete evidence about future management arrangements', raises issues of fact, not law.

[101] Second, the Tribunal found, as a fact, that the MPRDA and the NEMA require financial provisioning for post-closure rehabilitation of the mining area; and that the proposed water treatment plant to be used during mining operations is adequate, given its modularised design. This makes the plant flexible and adaptable to changes in the volumes of water to be treated, and to future technological advances. The appellants' own witness, Mr Johnstone, conceded that the modularised water treatment plant was a reasonable solution for the treatment of contaminated water. He stated that financial provision should be made for water treatment, and '[w]hether it stays with the Department of Minerals and Energy or the Department of Water Affairs, does not matter'.

[102] For the above reasons, the appellants' challenge to the Tribunal's decision does not constitute a question of law. It follows that on this ground also, the appeal cannot succeed.

Ground 4: failure to apply the precautionary principle

[103] Before the Tribunal, the appellants' ground of appeal on this issue was that the precautionary principle was significant to the decision to issue the water use

licence, because of fundamental deficiencies in the second respondent's specialist studies. They also alleged that the principle should have been applied, because the DG imposed conditions in the licence requiring the second respondent to update earlier information and application forms; and a written motivation that the ecological risks and impacts of watercourses are minimal. However, there are no such conditions in the licence.

[104] In this regard, the amplified grounds of appeal state:

'An understanding of the groundwater impacts of the proposed colliery is the keystone of any meaningful assessment of the surface water, wetland and biodiversity-related impacts of the proposed colliery. This is because the most significant impacts of the proposed colliery are, and are related to, the dewatering of the groundwater aquifers below and in the vicinity of the proposed mining area and the decant of contaminated groundwater and AMD [acid mine drainage] from the underground mine workings. The Delta H groundwater assessment is Atha's most recent and sophisticated groundwater study. However, as explained extensively in the revised GCS review, the results (predictions) of the Delta H groundwater model are of a low confidence … .'

[105] Given that the groundwater model in the Delta H report is of a low confidence, the appellants stated in their appeal grounds, it is best suited for managing low value resources, in terms of the Australian groundwater modelling guidelines; and that according to the GCS review,

'it is evident that the area of and surrounding the proposed mining activity is a moderate to high value groundwater-dependent ecosystem. In light of this, a Class 3 model with a high level of confidence is required before a decision may be taken which will affect the resource.'

[106] The appellants went on to say:

'GCS states unequivocally that, due to the low confidence in the Delta H groundwater model, it "should not be used in its current state for any decision-making".'

[107] However, in the notice of appeal in the High Court, the appellants' case was transmogrified and dressed-up as a question of law. The notice states that the

Tribunal 'erred in its interpretation and application' of s 2(4)*(a)* of the NEMA, including the precautionary principle. The appellants contend that the Tribunal incorrectly interpreted the words, 'current knowledge about the consequences of actions and decisions'; and the words, 'limits of current knowledge about the consequences of actions and decisions', in s 2(4)*(a)*(vii) of the NEMA; and that it interpreted this provision as casting an onus of proof or evidential burden on the appellants to prove (a) a threat of irreversible environmental damage and (b) scientific uncertainty as to the environmental damage, which onus or evidential burden rests on the developer.[33]

[108] The notice of appeal also states that the Tribunal incorrectly found that the conditions for the application of the precautionary principle in the NEMA were not present and that it failed to apply the 'risk averse and cautious approach', contemplated in s 2(4)*(a)*(vii). It ought to have found that the necessary conditions for the application of the precautionary principle had been established, which militated against the grant of the water use licence.

[109] This change of tack is impermissible. The challenge to the DG's decision before the Tribunal, was squarely founded on 'fundamental deficiencies in the specialist studies' which, the appellants said, 'form the backbone' of the application for the water use licence. These are questions of fact.

[110] In dismissing this ground of appeal, the Tribunal said:

'Our view is also that the precautionary principle should be considered together with other principles in section 2(4) of the NEMA, especially of the principles of sustainable development. The principle does not require unequivocal scientific certainty before any affirmative decisions are taken, otherwise no development activities would be authorised. Indeed, the Appellants

[33] Section 2(4)*(a)*(vii) of the NEMA provides:
'Sustainable development requires the consideration of all relevant factors including the following:
. . .
(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.'

themselves repeatedly emphasised that their case was not that "*as a matter of law there is an absolute prohibition on the authorisation such as this ever being granted*."[34] *The perception of risk and uncertainty advanced by the appellants are grounded in the GCS Review findings and other expert reviews,*[35] which have been demonstrated in evidence to be shallow and lacking by way of ground truthing. Equally, however, the Respondents' scientific evidence does not, and cannot, provide absolute levels of comfort – the threshold is what risk is tolerable and whether reasonable measures are in place to manage the identified impacts.'

[111] It follows that the appellants challenge to the Tribunal's decision based on the precautionary principle raises purely questions of fact. Contrary to the submission in their heads of argument, they asked the High Court to revisit the factual findings made by the Tribunal, in the light of the GCS Review. Likewise, the argument that the Tribunal 'failed to properly apply the *environmental principles*'[36] – an attack no longer confined to the precautionary principle – given its finding that the second respondent's scientific evidence did not provide absolute levels of comfort in relation to tolerable risks, and whether the measures proposed to manage those risks are reasonable, are questions of fact. That ought to have been the end of the appellants' case on this ground in the High Court.

[112] Even the appellants' challenge that the Tribunal committed 'an error of law based on the application of the environmental principles', raises questions of fact dressed-up as a question of law. That challenge is founded on 'the contrasting evidence of Dr Le Maitre and Prof Witthüser; the Tribunal's factual findings that the decant was manageable, based on Mr Smit's evidence; and its acceptance of Prof Witthüser's evidence that the confidence in predicted mine inflows could significantly be improved by observation data obtained during mining operations. On these aspects the Tribunal found, as a fact, that the mitigation measures proposed by the second respondent (which were revised on various occasions after the DG raised concerns) 'are reasonable and technically adequate to deal

[34] Emphasis in the original.
[35] Emphasis added.
[36] Emphasis added.

with the impacts of dewatering, decant, and management of wastewater from the mine'.

[113] In this case, the precautionary principle itself and its scope are not in issue. What is in issue is the factual foundation for the application of the principle. That is a question of fact.[37] For these reasons this ground of appeal also fails.

Costs

[114] The appellants submit that they are insulated from costs orders by virtue of two considerations concerning costs awards in constitutional litigation: (i) the *Biowatch* principle, namely that the High Court proceedings were instituted to vindicate environmental rights under s 24 of the Constitution, which are genuine and not frivolous;[38] and (ii) they acted reasonably in the protection of the environment, as contemplated in s 32(2) of the NEMA.[39] They also contend that the High Court's finding in the first part of its judgment that public interest law centres act in the public interest when they facilitate the enforcement of rights under section 38*(d)* of the Constitution, precludes a finding of frivolity or vexatiousness against them. However, as stated above, this finding was made in an entirely different context and does not assist the appellants.

[115] Neither does *Biowatch* assist the appellants. The Constitutional Court, after stating the general rule in constitutional litigation that an unsuccessful litigant ought not to be ordered to pay costs to the State, should not be departed from simply because that party is able to pay costs, went on to say:[40]

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[37] *Magmoed* fn 22 at 811C.
[38] *Biowatch Trust v Registrar, Genetic Resources, and Others* [2009] ZACC 14; 2009 (6) SA 232 (CC); 2009 (10) BCLR 1014 (CC) (*Biowatch*) para 28.
[39] Section 32(2) of the NEMA provides:
'A court may decide not to award costs against a person who, or group of persons which, fails to secure the relief sought in respect of any breach or threatened breach of any provision of this Act, including a principle contained in Chapter 1, or of any provision of a specific environmental management Act, or of any other statutory provision concerned with the protection of the environment or the use of natural resources, if the court is of the opinion that the person or group of persons acted reasonably out of a concern for the public interest or in the interest of protecting the environment and had made due efforts to use other means reasonably available for obtaining the relief sought.'
[40] *Biowatch* fn 38 para 80.

'Conversely, a party should not get a privileged status simply because it is acting in the public interest or happens to be indigent. It should be held to the same standards of conduct as any other party, particularly if it has had legal representation. This means it should not be immunised from appropriate sanctions if its conduct has been vexatious, frivolous, professionally unbecoming or in any other similar way abusive of the processes of the court.'

[116] That is the case here. The appellants, who throughout have been represented by senior and junior counsel, vexatiously pursued the s 149(1) appeal, which has no merit. This, after they had enjoyed the benefit of an appeal against the DG's decision to issue the water use licence, in the form of a complete rehearing before the Tribunal.

[117] In this regard, the description of a 'vexatious proceeding' by Lord Bingham CJ in *Attorney-General v Barker*,[41] is instructive:

'The hallmark of a vexatious proceeding is in my judgment that it has little or no basis in law (or at least no discernible basis); that whatever the intention of the proceeding may be, its effect is to subject the defendant to inconvenience, harassment and expense out of all proportion to any gain likely to accrue to the claimant; and that it involves an abuse of the process of the court, meaning by that a use of the court process for a purpose or in a way which is significantly different from the ordinary and proper use of the court process.'

[118] The appeal lodged by the appellants has little or no basis in law. As demonstrated above, it does not raise a question of law. As to the proper construction of s 24 of the NWA, the appellants' real complaint is the absence of proof of the landowner's consent. This challenge was also opportunistic: the appellants knew or must have known that the licence was issued subject to the condition that the relevant landowner's consent had to be obtained before mining commences.

[119] In their notice of appeal, the appellants raised no less than 12 grounds of appeal, dressed-up as questions of law. A recurring theme in the notice is whether,

[41] *Attorney-General v Barker* [2000] 2 WLUK 602; [2000] 1 FLR 759 para 19.

what in truth is a question of fact, that question 'is a relevant factor in in the opening part of s 27(1) or s 27(1)*(a)*, *(b)*, *(c)*, *(d)*, *(e)*, *(f)*, *(g)*, *(i)* or *(j)* of the NWA', in order to disguise it as a question of law. As stated, the appellants persisted with only five grounds of appeal in the High Court. In this Court they advanced only four out of the 12 grounds of appeal, which have been found to lack merit. What is more, in advancing these grounds, they ignored the evidence and sought to evade the bases on which they had challenged the impugned decision before the Tribunal. And the ground that the High Court was biased, was opportunistic and stillborn.

[120] The appellants lodged the s 149(1) appeal despite a review application that they launched against the same parties, which is pending in the Pretoria High Court. In the review they challenge the DG's decision to issue the water use licence on the same factual grounds; and the second respondent is obliged to oppose that application if it wants to retain its water use licence.[42] Public funds will again be expended in the DG's opposition to that application.

[121] The appellants lodged this appeal regardless of the consequences: the inconvenience to and exorbitant costs that would be incurred by the respondents (the appellants filed a record consisting of a core volume and 26 volumes comprising more than 5000 pages); and in particular, the harassment of the second respondent, an innocent party, which has been dragged to court and opposed the appeal in order to preserve its licence.

[122] In 2011 the second respondent was invited to invest in South Africa. It has made an investment of US$ 40 million in equity and prospecting rights to engage in coal mining. It has spent US$ 61 million solely on specialist studies, to secure the necessary authorisations. More than ten years later no mining has started and

[42] *Endangered Wildlife Trust and Others v Director-General Department of Water and Sanitation and Others* (*Review of Water Tribunal's decision*), Pretoria High Court, Case no 86261/2019 (Appeal No WT 03/17/MP) [2019] ZAWT 3 (22 May 2019).

the second respondent has not realised any return on its investment. The application for the water use licence alone took some four years, given the specialist studies required. Concerning costs, the appellants pay no regard to 'the investments already made and to be made by the water user in respect of the water use in question', as envisaged in s 27(1)*(h)* of the NWA.

[123] The uncontradicted evidence of Mr Triparthi is that prior to the declaration of the Mabola Protected Environment, the second respondent had done environmental due diligence before acquiring the prospecting right (which had been in continuous existence for 20 years), because of historical mining in the entire area. He said that there were consultations between the second respondent, the relevant member of the Executive Council, the Mpumalanga Tourism and Parks Agency and various non-governmental organisations, including the World Wildlife Fund. The outcome of these consultations was that mining and environmental protection could coexist in the area. However, once the relevant area was declared a protected environment, the entire narrative changed.

[124] In the result the applicants, together with other environmental organisations, launched no less than five applications against the second respondent, to prevent mining.[43] These applications include proceedings by the appellants to review and set aside: (i) the Tribunal's decision to dismiss the appeal against the issuance of the water use licence;[44] and (ii) the Municipality's decision granting a change of land use from agricultural to mining and ancillary purposes.[45] In these circumstances, the appellants' submission that the second

[43] *Earthlife Africa Johannesburg and Others v Minister of Mineral Resources and Others*, Gauteng Division of the High Court, Pretoria, Case no 73278/2015; *Mining and Environmental Justice Community Network of South Africa and Others v Minister of Environmental Affairs and Others* [2018] ZAGPPHC 807; [2019] 1 All SA 491 (GP); *Endangered Wildlife Trust and Another v Director General: Department of Water and Sanitation (Acting) and Another* [2023] ZAGPPHC 310; A155/2019 (10 May 2023); *Endangered Wildlife Trust and Others v Director-General Department of Water and Sanitation and Others* (*Review of Water Tribunal's decision*), Pretoria High Court, Case no 86261/2019 (Appeal No WT 03/17/MP) [2019] ZAWT 3 (22 May 2019); *Mining and Environmental Justice Community Network of South Africa and Others v Gert Sibande Joint Municipal Planning Tribunal and Others (Gert Sibande)* Mpumalanga Division (Middelburg Local Seat) High Court (1344/2020); [2024] ZAMPMHC 7 (22 January 2024).
[44] *Review of Water Tribunal's decision* fn 43.
[45] *Gert Sibande* fn 43.

respondent should be denied its costs, is untenable.[46] Opponents who are harassed by the worry and costs of vexatious litigation, which in most cases are exorbitant, are entitled to protection.

[125] Another factor regarding costs, is that the members of the local community, who are in dire need of upliftment and jobs and support the proposed mine, have been prejudiced by the appellants' conduct in launching this appeal. The Tribunal observed that the appellants were preoccupied with the environmental impacts of the mine, to the virtual exclusion of social and economic impacts of sustainable development. They presented no site-specific information (positive or negative) relating to the socio-economic impacts of the water uses if authorised, or of the failure to authorise the water uses, as contemplated in s 27(1)*(d)* of the NWA. Mr Triparthi's evidence that if mining commences, there would be at least R700 million of capital expenditure over a period of three years; that it would generate employment for more than 500 people; and that it would stimulate the local economy and small and medium enterprises, was not challenged. And Mr Nene testified that unlike the CER, the community 'lack[s] money to fight in the same system, the same courts'.

[126] There are further considerations that justify a costs award against the appellants. The respondents ask for an order that the appellants pay the costs incurred in the High Court and on appeal. The DG's costs are paid out of public funds, ultimately by taxpayers. In addition to an unmeritorious appeal and the vexing of the second respondent, scarce and valuable judicial resources have been wasted on a misconceived appeal, to the detriment of other litigants with cases which have real merit. All of this, in the specific circumstances of this case, constitute an abuse of the court process. Judicial resources in this country are

[46] *South Durban Community Environmental Alliance v MEC for Economic Development, Tourism and Environmental Affairs: KwaZulu-Natal Provincial Government and Another* [2020] ZASCA 39; [2020] 2 All SA 713 (SCA); 2020 (7) BCLR 789 (SCA); 2020 (4) SA 453 (SCA) para 51.

barely sufficient to afford justice without unreasonable delay in deserving cases, and should not be wasted on misconceived litigation. And these resources will again be utilised in the hearing of the appellants' review application of the Tribunal's decision in the Pretoria High Court.

[127] In all of this, the appellants ask this Court to make an order overturning the decisions of the High Court and the Tribunal and to replace them with a decision refusing the water use licence. Given the expertise of the Tribunal and the nature of the matter, this submission cannot seriously be made.

[128] There comes a time when it is right for a court to hold an organisation which brings vexatious proceedings and claims to act in the interests of the public and the environment, to the same standards of conduct as any other litigant. For all of the above reasons, the appellants have not shown why they should not be held to these standards. The appeal is dismissed with costs, including the costs of two counsel where so employed.

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A SCHIPPERS

JUDGE OF APPEAL

Appearances:

For appellants:	A Dodson SC
Instructed by:	Centre for Environmental Rights, Cape Town
	Phatshoane Henney Attorneys, Bloemfontein
For first respondent:	M Mphaga SC with M Mathaphuna
Instructed by:	The State Attorney, Pretoria
	The State Attorney, Bloemfontein
For second respondent:	R Zimerman
Instructed by:	Taitz & Skikne Attorneys, Johannesburg
	EG Cooper Majiedt Inc Attorneys, Bloemfontein