

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Case No.: _____

In the matter between:

GROUNDWORK	First Applicant
MINING AND ENVIRONMENTAL JUSTICE COMMUNITY NETWORK OF SOUTH AFRICA	Second Applicant
EARTHLIFE AFRICA JOHANNESBURG	Third Applicant
BIRDLIFE SOUTH AFRICA	Fourth Applicant
ENDANGERED WILDLIFE TRUST	Fifth Applicant
FEDERATION FOR A SUSTAINABLE ENVIRONMENT	Sixth Applicant
ASSOCIATION FOR WATER AND RURAL DEVELOPMENT	Seventh Applicant
THE BENCH MARKS FOUNDATION	Eighth Applicant

and

ATHA-AFRICA VENTURES (PTY) LTD	First Respondent
DR PIXLEY KA ISAKA SEME LOCAL MUNICIPALITY	Second Respondent
GERT SIBANDE DISTRICT MUNICIPALITY	Third Respondent
MEC FOR AGRICULTURE, RURAL DEVELOPMENT, LAND AND ENVIRONMENTAL AFFAIRS, MPUMALANGA	Fourth Respondent
THE MINISTER OF ENVIRONMENTAL AFFAIRS	Fifth Respondent
CHIEF DIRECTOR, DEPARTMENT OF AGRICULTURE, RURAL DEVELOPMENT, LAND AND ENVIRONMENTAL AFFAIRS, MPUMALANGA	Sixth Respondent
THE MINISTER OF MINERAL RESOURCES	Seventh Respondent

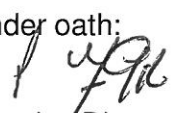


FOUNDING AFFIDAVIT

I,

SVEN EATON PATRICK PEEK

state as follows under oath:

- 
1. I am the ~~Executive~~ Director of the first applicant, groundWork.
 2. The contents of this affidavit are within my personal knowledge, unless the context indicates otherwise, and are to the best of my belief true. Where I make legal submissions, I do so on the advice of the applicants' legal representatives.
 3. The applicants' attorneys are authorised and mandated to bring this application on the applicants' behalf.

INTRODUCTION

4. The first respondent, Atha-Africa Ventures (Pty) Ltd ("**AAV**"), intends to establish the Yzermyn underground coal mine near Wakkerstroom in Mpumalanga Province. The underground mining will occur within the Mabola Protected Environment, and the planned surface infrastructure is located directly adjacent to the protected area and within the endangered Montane grasslands ecosystem. To the best of my knowledge, AAV plans to commence mining activities by 28 June 2017.



5. The purpose of this application is to interdict AAV from commencing the mining activities (as described in the notice of motion) at least until it has complied with the requirements imposed by the National Environmental Management Act No. 107 of 1998 ("**NEMA**"), the Mineral and Petroleum Resources Development Act No. 28 of 2002 ("**MPRDA**") and the Spatial Planning and Land Use Management Act No. 17 of 2014 ("**SPLUMA**") and related legislation.
6. The applicants contend that AAV cannot lawfully commence mining on 28 June 2017. There are two primary reasons why this is so:
 - 6.1. Firstly, AAV does not have a valid Environmental Authorisation ("**EA**"). The EA granted to AAV has been suspended pending the finalisation of an appeal against the grant of the EA in terms of section 43(7) of NEMA. AAV may not commence mining activity while the EA is suspended. A valid EA is a condition of AAV's mining right and a statutory requirement imposed by section 24F(1)(a) of NEMA. A breach of NEMA is a criminal offence in terms of section 49A(1)(a) of NEMA.
 - 6.2. Secondly, mining is not a permitted use of the land on which AAV intends to commence mining activities. The use of the various portions of land comprising the proposed mining area is currently restricted in terms of section 26(3) of SPLUMA, read with Schedule 2 to SPLUMA, to agricultural purposes and conservation purposes. The area of the mine where the surface infrastructure is to be established is restricted to the use of the land for agricultural purposes. The area where the underground mining is intended to take place is restricted to conservation and agricultural purposes. No mining activity may

commence until the Dr. Pixley Ka Isaka Seme Local Municipality approves a change of land use pursuant to an application. No compliant application has been brought by AAV. It is a criminal offence in terms of section 58 of SPLUMA to use land contrary to a permitted land use. Section 25(2)(d) of the MPRDA requires the holder of a mining right to comply with "*any other relevant law*". A breach of SPLUMA is therefore also a breach of the MPRDA and an offence in terms of section 98(a)(viii) of the MPRDA. It is also a breach of AAV's mining right.

7. The applicants thus have a clear right. The impact of the unlawful commencement of mining activities on the Mabola Protected Environment and surrounding areas will be environmentally catastrophic and will cause irreparable harm to the environment and local communities. The applicants are justified in seeking an urgent interdict to prevent this irreparable harm to this highly sensitive area of environmental importance.
8. The applicants seek final relief in this application. The interdict is, however, interim in the sense that it will, for the present, extend only until the finalisation of the statutory appeal relating to the EA and until AAV has obtained the necessary change of land use authorisations under SPLUMA.
9. However, I should immediately mention that there is already a judicial review underway in respect of the decision to award AAV a mining right, a statutory appeal to the Water Tribunal against the grant of a water use licence to AAV under the National Water Act No. 36 of 1998 and judicial review applications are being prepared and/or will in the future be launched in respect of –

- 9.1. the decision of the fifth respondent to uplift the automatic suspension of the water use licence which resulted from the submission of the statutory appeal to the Water Tribunal against the grant of the water use licence; and
- 9.2. the decisions of the fifth and seventh respondents to grant permission under section 48(1)(b) of the National Environmental Management: Protected Areas Act No. 57 of 2003 ("**NEMPAA**").
10. The applicants' rights are reserved in relation to the above appeals and reviews, including the right to seek interim interdictory relief in relation to them in the future.
11. In this affidavit I will deal with the following topics:
 - 11.1. The parties;
 - 11.2. The facts;
 - 11.3. Urgency and injury reasonably apprehended;
 - 11.4. AAV cannot lawfully commence mining activities until the finalisation of the appeal against the EA;
 - 11.5. AAV cannot lawfully commence mining activities until the use of the land for mining has been authorised;
 - 11.6. The requirements for an interdict are met in this case;
 - 11.7. Conclusion.

THE PARTIES

12. The first applicant is groundWork. groundWork is a non-profit environmental justice service and developmental organisation with NPO-number 045-235-NPO. groundWork has its physical address at 6 Raven Street, Pietermaritzburg. groundWork seeks to improve the quality of life of vulnerable people in South Africa, and increasingly in southern Africa, through assisting civil society to have a greater impact on environmental governance. groundWork places particular emphasis on assisting vulnerable and previously disadvantaged people who are most affected by environmental injustices.
13. The second applicant is the Mining and Environmental Justice Community Network of South Africa ("**MEJCON-SA**"). MEJCON-SA is a non-profit voluntary organisation with its administrative address at c/o Centre for Environmental Rights, 2nd Floor, Springtime Studios, 1 Scott Street, Observatory, Cape Town. MEJCON-SA was constituted in October 2012 with the main objective of promoting and defending the environmental and human rights of communities directly and indirectly affected by mining, and to ensure the sustainable use of mineral resources.
14. Earthlife Africa Johannesburg is a non-profit organisation in terms of the Non-Profit Organisations Act, with NPO number 004-159. Its offices are at 87 De Korte Street, 5th Floor, Heerengracht Building, Braamfontein, Johannesburg. Its main objective is to challenge environmental degradation and promote a culture of environmental awareness and sustainable development. It also seeks to improve the quality of life of vulnerable people in South Africa through assisting civil society to have greater impact on environmental governance by understanding

and defending their constitutional rights, specifically those enshrined in section 24 of the Constitution of the Republic of South Africa.

15. BirdLife South Africa is a non-profit and public benefit organisation registered in terms of the laws of the Republic of South Africa with NPO registration number 001-298 NPO and PBO exemption number 930 004 518, with its head office at 239 Barkston Drive, Blairgowrie, Johannesburg. It is an independent nature conservation organisation with the mission of promoting the enjoyment, conservation, study and understanding of wild birds and their habitats. BirdLife South Africa has over 6000 members in 32 bird clubs throughout South Africa. BirdLife South Africa is a partner in the Grasslands Programme, which is a partnership between government, non-governmental organisations and the private sector to mainstream biodiversity in the Grasslands Biome, with the intention to balance biodiversity conservation and development of protected areas in a production landscape.
16. The Endangered Wildlife Trust ("**EWT**") is a non-governmental, non-profit organisation and a public benefit organisation with NPO number 015-502 and PBO number 930 001777. EWT has its physical address at Building K2, Ardeer Road, Pinelands Office Park, Modderfontein, Gauteng. EWT is a fully accredited member of the International Union for the Conservation of Nature and is dedicated to conserving threatened species and ecosystems in southern Africa.
17. The Federation for a Sustainable Environment ("**FSE**") is a registered non-profit organisation with registration number 2007/033134/08 and NPO number 062986-NPO. FSE has its physical address at 8 Palladio Road, corner of Ryk Street and Roux Avenue, Bervely Gardens, Johannesburg. The FSE's main

objective is promoting the ecological sustainability of development and the wise use of natural resources in South Africa.

18. The Association for Water and Rural Development ("**AWARD**") is a non-profit organisation with company registration number 98/03011/08 and non-profit organisation registration number 006-821. Its physical address is at Number 14 Safari Junction, Hoedspruit, Limpopo. AWARD specialises in participatory, research-based project implementation aimed at addressing issues of sustainability, inequity and poverty through building natural resource management and sustainable water-based livelihoods. AWARD's vision is to contribute to a more sustainable world and in particular, to a democratic South Africa through building active civil society participation in wise water and biodiversity stewardship, management and governance.
19. The Bench Marks Foundation is a non-profit, faith-based organisation owned by the churches in South Africa, with its physical address at 6th Floor, Khotso House, 62 Marshall Street, Marshalltown, Johannesburg. The Bench Marks Foundation is committed to providing leadership and advocacy on issues regarding benchmarking of good corporate governance, ethical and socially responsible investment as well as linking people and institutions committed to these ideals. The vision of the Bench Marks Foundation is to promote corporate social responsibility and socially responsible investment.
20. I will refer to the first to eighth applicants collectively as "the coalition" of community-based and civil society organisations.

The applicants' locus standi

21. The coalition brings this application:
- 21.1. In its own interest in terms of section 38(a) of the Constitution and section 32(1)(a) of NEMA; and
 - 21.2. In the interests of its members in terms of section 38(d) of the Constitution; and
 - 21.3. In the public interest in terms of section 38(d) of the Constitution and section 32(1)(d) of NEMA; and
 - 21.4. In the interest of protecting the environment in terms of section 32(1)(e) of NEMA.
22. The public, the coalition and its members have a direct and substantial interest in the resolution and outcome of this matter.
23. The public has a legitimate interest in AAV's conduct and its compliance with the statutory obligations imposed on it by NEMA, SPLUMA and the MPRDA as the holder of a mining right in South Africa. This is especially so when the breach of these obligations will have a serious impact on the public's fundamental constitutional right to a healthy environment as envisaged in section 24 of the Constitution which provides that:

"Everyone has the right to an environment that is not harmful to their health or well-being; and to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that prevent pollution and ecological degradation; promote conservation; and secure ecologically

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sustainable development and use of natural resources while promoting justifiable economic and social development."

The Respondents

24. The first respondent is Atha-Africa Ventures (Pty) Ltd, a private company registered in terms of the laws of South Africa, with registration number 2004/0207/46/07 and with its registered address at 8th Floor, Sinosteel Plaza, 159 Rivonia Road, Sandton Johannesburg.
25. The second respondent is the Dr Pixley Ka Isaka Seme Local Municipality ("**the Local Municipality**"), a Local Municipality established in terms of the Constitution read with the Local Government: Municipal Structures Act, No. 117 of 1998, with its physical address at corner of Nelson Mandela Drive and Adelaide Thambo Street, Volksrust.
26. The third respondent is the Gert Sibande District Municipality ("**the District Municipality**"), a District Municipality established in terms of the Constitution read with the Local Government: Municipal Structures Act, No. 117 of 1998, with its physical address at corner of Joubert and Oosthuise Streets, Ermelo.
27. The fourth respondent is the MEC for Agriculture, Rural Development, Land and Environmental Affairs, Mpumalanga, cited in his official capacity as the member of the Provincial Executive responsible for *inter alia* the conservation of the province's bio-diversity and ecosystems, the protection, conservation and enhancement of the quality of the environment for present and future generations, and sustainable land development. The MEC's principal place of business is No. 7 Government Boulevard, Building No. 6, 1 & 2nd Floor,

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Riverside Park, Nelspruit and this application is served care of the State Attorney, Pretoria, 316 Thabo Sehume Street, Pretoria, Gauteng.

28. The fifth respondent is the Minister of Environmental Affairs, cited in her official capacity as the member of the National Executive responsible for the development and implementation of the legislative scheme created to ensure enforcement and compliance with environmental law, and mandated to give effect to the right of citizens to an environment that is not harmful to their health or wellbeing, and to have the environment protected for the benefit of present and future generations. The Minister of Environmental Affairs' principal place of business is Environment House, Steve Biko Road, Arcadia, Pretoria and this application is served care of the offices of the State Attorney, Pretoria, 316 Thabo Sehume Street, Pretoria, Gauteng.
29. The sixth respondent is the Chief Director, Department of Agriculture, Rural Development, Land and Environmental Affairs, Mpumalanga, cited in his official capacity as a senior functionary within the Mpumalanga Department of Agriculture, Rural Development, Land and Environmental Affairs. The Chief Director's principal place of business is No. 7 Government Boulevard, Building No. 6, 1 & 2nd Floor, Riverside Park, Nelspruit and this application is served care of the State Attorney, Pretoria, 316 Thabo Sehume Street, Pretoria, Gauteng.
30. The seventh respondent is the Minister of Mineral Resources cited in his official capacity as the member of the National Executive responsible for the regulation of mining and the mining sector in South Africa. The Minister of Mineral Resources' principal place of business is Trevenna Campus, corner of Meintjes and Francis Baard Street, Pretoria, and this application is served care of the

offices of the State Attorney, Pretoria, 316 Thabo Sehume Street, Pretoria, Gauteng.

31. The eighth respondent is the Minister of Water and Sanitation cited in her official capacity as the member of the National Executive responsible for South Africa's water resources and tasked with ensuring that all South Africans gain access to clean water and dignified sanitation. The Minister of Water and Sanitation's principal place of business is Sedibeng Building, 10th Floor, Room 1029, 185 Francis Baard Street, Pretoria, and this application is served care of the offices of the State Attorney, Pretoria, 316 Thabo Sehume Street, Pretoria, Gauteng.
32. No relief is sought against the second to eighth respondents save for costs in the event that they oppose the application. They are joined because of any interest they might have in the application, having regard to their respective statutorily ordained regulatory roles.

FACTUAL BACKGROUND

The Mabola Protected Environment

33. The Mabola Protected Environment is an area of grasslands and wetlands covering 8 772 hectares situated in the Wakkerstroom area in Mpumalanga Province.
34. On 22 January 2014 the Member of the Executive Council for the Department of Economic Development and Tourism, Mpumalanga, gave notice in terms of section 28(1)(a)(i) and (b) of NEMPAA of the declaration of a number of protected environments, including the Mabola Protected Environment (**the Mabola**

Protected Environment”). A copy of the notice in the Government Gazette giving notice of this declaration is attached as Annexure **FA1** (**“the Protected Environment notice”**).

35. The Mabola Protected Environment is a high-yielding water catchment area composed mostly of wetlands and pans that feed the Limpopo, Tugela, Vaal, Usutu and Pongola Rivers. It is a strategic water source area, generating critical water supplies for downstream agricultural, industrial and human water users. The area is also made up of the endangered Wakkerstroom Montane grassland ecosystems that support endangered species.
36. It is widely acknowledged that the Mabola Protected Environment covers an area of critical hydrological importance and biodiversity to South Africa.
 - 36.1. The area falls within a National Freshwater Ecosystem Priority Area and a Strategic Water Source Area, determined by the South African National Biodiversity Institute (**“SANBI”**) as part of the National Freshwater Ecosystem Project, funded by the Water Research Commission, the Council for Scientific and Industrial Research (**“CSIR”**), SANBI, the Department of Water Affairs (now the Department of Water and Sanitation) and the Department of Environmental Affairs. The Strategic Water Source Areas are the 8% of South Africa’s land area that provide 50% of our surface water run-off;
 - 36.2. The area comprises habitat that has been zoned by the national Mining and Biodiversity Guideline as having the Highest Importance for Biodiversity. The National Mining and Biodiversity Guideline was developed by the South African Mining and Biodiversity Forum which

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brings together stakeholders from industry, conservation organisations and government. This guideline provides the mining sector with a manual for integrating biodiversity considerations into planning processes and managing biodiversity during the developmental and operational phases of a mine, from exploration through to closure;

- 36.3. The area forms part of the Wakkerstroom/Luneburg Grasslands Threatened Ecosystem, listed as an endangered ecosystem in the National List of Ecosystems that are Threatened and in Need of Protection published in terms of the National Environmental Management: Biodiversity Act, No. 10 of 2004 ("**NEMBA**");
- 36.4. The area has been identified in the National Protected Areas Expansion Strategy (2008) as an area that requires urgent legal protection;
- 36.5. In the most recent Mpumalanga Biodiversity Sector Plan prepared by the Mpumalanga provincial government, considerable portions of the proposed mining area are defined either as "Irreplaceable" or "Optimal" Critical Biodiversity Areas; and
- 36.6. The Local Municipality's Spatial Development Framework acknowledges:

"The Wakkerstroom wetland is a very important ecological wetland as a vital catchment for the Vaal and Pongola River and its rich diversity of plant and animal life. The wetland systems are home to all three of the crane species occurring in South Africa namely the Blue, Crowned and Wattled Cranes, as well as other protected bird, frog and plant species. There are also a number of Natural Heritage sites within the municipality which are located around Wakkerstroom (Tafelkop,



Boskop, Wakkerstroom and Kombewaira) as well as a large area near Warburton called Theespruit. Large portions of grassland near the Wakkerstroom region remain in near-pristine condition because this region has not been considered well-suited for the cultivation of timber, crops or grazing. The areas important for bird conservation are located primarily in a broad north south axis from Wakkerstroom to Carolina. In addition, the central portions of the municipality have also been identified as a bird conservation hotspot.

The Wakkerstroom Wetlands is host to one of the largest international wetland- and water bird conservation initiatives in the African-Eurasian region (Wings over Wetland) and is listed as an important bird area. It is also home to the National Grassland Programme's agricultural demonstration project and its grasslands have been assessed as "critically important" in terms of MBCP [Mpumalanga Biodiversity Conservation Plan] which falls under the auspices of the SANBI." (pages 77 – 78)

AAV's mining right and the Yzermyn Coal Mine

37. Just eight months after the Mabola Protected Environment was declared a protected environment, the Director General: Department of Mineral Resources ("DG: DMR") granted AAV a mining right for the proposed Yzermyn underground coal mine over the properties Bloemhof 92 HT, Goedgevonden 95 HT, Kromhoek 93 HT, Portion 1 of the farm Nauwgevonden 110 HT, Paardekop 109 HT, Uitzicht 108 HT, Portion 2 and the remaining extent of the farm Van der Waltsport 81 HT, Virginia 91 HT, Waaihoek 87 HT, Portion 1 and the remaining extent of the farm Yzermyn 96 HT and Zoetfontein 94 HT. Pursuant to representations made by AAV to the Department of Mineral Resources regarding certain environmental conditions that the DG: DMR had attached to his grant of the mining right, the

Minister of Mineral Resources withdrew the DG: DMR's grant and issued a fresh mining right on 14 April 2015 in similar terms, save that the environmental conditions were omitted.

38. The coalition is not in possession of the mining right, but has seen the letter from the Minister of Mineral Resources on 14 April 2015 informing AAV that the mining right had been granted. The letter is attached as Annexure **FA2**.

39. Over the last three years, despite a statutory appeal against the grant of the mining right and a pending high court review challenging the grant of the mining right, AAV has proceeded to apply for other authorisations required to commence mining activities:

39.1. AAV has obtained an EA to conduct mining-related activities listed in the NEMA 2010 Listing Notices on Portion 1 of the farm Yzermyn 96 HT. The EA is the subject of a pending statutory appeal in terms of section 43(2) of NEMA. Oral submissions in respect of the appeal were due to take place on 13 and 14 June 2017, but this was recently postponed for hearing on dates to be agreed in September 2017. I will refer to this as "the EA statutory appeal";

39.2. AAV has applied for and obtained a water-use licence in terms of the National Water Act for various water uses on the properties Goedgevonden 95 HT, Kromhoek 93 HT, Portion 1 of the farm Yzermyn 96 HT, Zoetfontein 94 HT and Vaalbank 74 HT. A statutory appeal against the grant of the water-use licence has been lodged and awaits a hearing before the Water Tribunal established in terms of the National Water Act. No date has been allocated for the hearing of the appeal;



- 39.3. AAV has applied for and obtained permission in terms of section 48(1)(b) of NEMPAA to conduct mining activities in the Mabola Protected Environment. A judicial review of the decisions of the fifth and seventh respondents in this regard will be launched by the coalition before the end of July 2017; and
- 39.4. Furthermore, the Department of Mineral Resources has approved AAV's Environmental Management Programme ("**EMPR**") in terms of the now repealed section 39 of the MPRDA. The EMPR is the subject of a pending statutory appeal in terms of section 96 of the MPRDA.
40. I should emphasise that the coalition has complied carefully with all of the statutory time limits for each of the steps it has taken either by way of lodging statutory appeals or the bringing of judicial review proceedings and will continue to do so.
41. According to AAV's Environmental and Social Impact Assessment Report and Environmental and Social Management Programme (January 2015), as well as its water use licence, AAV intends to conduct underground mining on the properties Goedgevonden 95 HT, Kromhoek 93 HT, Portion 1 of the farm Yzermyn 96 HT and Zoetfontein 94 HT. Goedgevonden 95 HT and Kromhoek 93 HT fall within the Mabola Protected Environment. Accordingly, the underground mining will occur within the Mabola Protected Environment. The total footprint of the surface infrastructure will be approximately 22.4 hectares and will be located on Portion 1 of the farm Yzermyn 96 HT, directly adjacent to the Mabola Protected Environment and within wetlands and grasslands forming

part of the ecosystem. The mining site borders the KwaMandhlangampisi Protected Environment.

URGENCY AND INJURY REASONABLY APPREHENDED

42. The EA under NEMA was purportedly granted on 7 June 2016. The coalition timeously lodged a statutory appeal against the decision of the sixth respondent on 19 August 2016.
43. On 28 November 2016, the attorneys for the coalition addressed a letter to AAV requesting a range of information in regard to which regulatory approvals were still outstanding and requesting information as to when AAV intended to commence any activities on site. The coalition also sought an undertaking from AAV that it would provide 30 days written notice before any such commencement. No response to this letter was forthcoming.
44. An issue that arose was differences between the coalition and the sixth respondent as to whether or not the effect of the lodging of the statutory appeal was to suspend the EA in terms of section 43(7) of NEMA. The matter was taken up in a telephone conversation between Ms Pamella Ntuli of the office of the sixth respondent and Ms Thobeka Gumede of the coalition's attorneys on 7 April 2017. In the course of the conversation, Ms Ntuli stated that AAV had undertaken to the sixth respondent not to commence with any activities governed by the EA until the final adjudication of the appeal. This was recorded in paragraph 4 of a letter subsequently addressed to the sixth respondent on behalf of the coalition on 24 May 2017. I attach a copy of the letter as Annexure **FA3**.

45. In a Finweek article of 18 May 2017, Mr Praveer Triphati, AAV's senior vice president is quoted as saying that AAV intends to "break first ground" on the project in June 2017 and that it was awarding contracts for the mine's construction during May 2017. I attach a copy of the article as Annexure **FA4**.
46. This information took us by surprise because of the inaction on the part of AAV following the lodging of the statutory appeal against the EA, AAV's failure to respond to the letter of 28 November 2016 and the undertaking that had been referred to by Ms Ntuli of the office of the sixth respondent.
47. The coalition's attorney therefore addressed the letter of 24 May 2017, annexure FA3, asserting the coalition's interpretation of the legal effect of the lodging of the statutory appeal against the EA i.e. that the EA was suspended.
48. Shortly after that, on 31 May 2017, the coalition's attorneys, acting on its instructions, addressed a letter to AAV's attorneys. I attach this letter as Annexure **FA5**. In the letter, our attorneys *inter alia* -
- 48.1. referred to the pending oral hearing in respect of the statutory appeal against the EA, which at that stage was meant to be heard on 13 and 14 June 2017 (it has since been postponed to a date to be agreed in September 2017, apparently at the instance of the fourth respondent or the panel established by him);
- 48.2. referred to the undertaking given by AAV to the sixth respondent not to commence mining pending the statutory appeal against the EA;
- 48.3. referred to the fact that section 43(7) meant that the statutory appeal suspended the EA;

- 48.4. referred to the processes underway by way of a statutory appeal to the Water Tribunal in respect of the water use licence and the judicial review of the permissions granted under the NEMPAA;
- 48.5. explained in what respects AAV had failed to obtain the required authorisation under SPLUMA; and
- 48.6. sought an undertaking from AAV, to be provided by 8 June 2017, that it would not commence mining until the finalisation of the statutory appeal in respect of the EA and until AAV had lawfully secured its change of land use authorisations under SPLUMA.
49. No response was forthcoming on 8 June 2017. We therefore instructed our attorneys to begin to take steps to prepare an urgent application. However we did not wish to act precipitately, so while these steps were underway and on 12 June 2017, Ms Horsfield of the coalition's attorneys telephoned the attorney for AAV to enquire about when he would respond to the letter of 31 May 2017. He indicated that he would be consulting with representatives of AAV on 13 June 2017 and would respond soon after that. The tone of the conversation suggested that it would not be appropriate for the coalition to rush immediately to court. A copy of the email letter on 15 June 2017 confirming the conversation is attached as annexure **FA6**.
50. Notwithstanding the date reflected on the letter, late on Thursday 15 June 2017 at 3.56 pm, with the public holiday taking place the next day, AAV's attorney responded to the coalition's attorney. A copy of the letter is attached marked **FA7**. The letter was not entirely clear as to what AAV's intentions were in regard to the commencement of mining activities. On the one hand, AAV said that it

would only commence mining when it had all the applicable authorisations. On the other hand, AAV -

50.1. asserted that it is currently the holder of a valid land use re-zoning approval obtained from the Pixley Ka Seme Local Municipality;

50.2. asserted that it is the holder of an "unsuspended" EA granted in terms of NEMA;

50.3. denied that it had given any undertaking that it would not commence mining pending the outcome of the EA statutory appeal; and

50.4. refused to provide the undertaking requested.

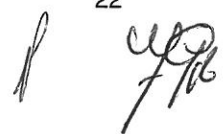
51. AAV also noted in the letter that it is legally entitled to exercise its statutory rights in terms of the mining right including "*adhering to the timeframe relevant to the commencement of mining activities*".

52. The coalition assumes that AAV refers to its obligation in terms of section 25(2)(b) of the MPRDA which provides:

"The holder of a mining right must ... commence with mining operations within one year from the date on which the mining right becomes effective in terms of section 23 (5) or such extended period as the Minister may authorise".

53. Section 23(5) provides that "*A mining right granted in terms of subsection (1) comes into effect on the effective date.*"

54. The letter to AAV from the Minister on 14 April 2015 approving the mining right states: "*the mining right comes into effect on the date on which the Environmental Management Programme is approved.*"
55. The Environmental Management Programme ("**EMPR**") was approved on 28 June 2016. This means that section 25(2)(b) of the MPRDA requires AAV to commence mining on 28 June 2017, unless it has obtained an extension of this period from the Minister.
56. To the extent that the letter was equivocal, the coalition's attorney addressed a further letter to AAV's attorney asking *inter alia* for clarification about when exactly it intended to commence mining and associated activities and repeating its explanation as to why the EA was suspended. The coalition's attorney pointed out in the letter that AAV needed to be transparent as to its intentions as the coalition did not wish to engage the jurisdiction of the urgent court unless this was strictly necessary. A copy of the letter is attached marked **FA8**. The letter was sent on Monday 19 June 2017, immediately following the long weekend, and called for a response by 09h00 on Tuesday 20 June 2017. At the time of deposing to this affidavit, there has been no response to the letter. Our attorneys will file an affidavit dealing with any further developments in this regard subsequent to my deposing to this affidavit.
57. Even though, at the time of deposing to this affidavit, no response has yet been received to that letter, annexure FA8, the coalition submits that, based on the background provided above, this matter is indeed urgent. This is particularly so having regard to AAV's refusal to provide the undertaking requested and its insistence (albeit a flawed one) that it has the requisite authorisations in place to

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commence mining. The coalition justifiably fears that AAV intends to commence mining activities by 28 June 2017, if not sooner.

58. If the coalition seeks the interdictory relief in the normal course, with the requisite waiting period in respect of the allocation of a hearing date, the mining activity will have commenced and be substantially under way by the time that the matter is heard. The oral hearings for the determination of the EA statutory appeal have already been postponed and there is nothing to prevent further delays in its determination. Regularising the position with the Local Municipality will take time for reasons that will become apparent below. The result will be that irreparable harm will have been caused to the environment during the period while these processes are under way. I say that there will be irreparable harm for the following reasons.
59. The coalition commissioned three scientific reviews of the environmental impact assessments commissioned by AAV in respect of the Yzermyn project, one by Ms S Brownlie, ("**the Brownlie review**"), one by Prof Ingrid Dennis ("**the Dennis review**") and one by GCS Water and Environmental Consultants ("**the GCS review**").
60. AAV's full faunal, floral, aquatic and wetland ecological assessment was conducted by Natural Scientific Services CC ("**NSS**"). Scientific Aquatic Services CC also produced a report entitled 'Wetland Ecological Assessment as part of the Environmental Assessment and Authorisation Process for the proposed Yzermyn Coal Mining Project' dated June, August 2014.
61. I do not attach the full versions of these reports but they will be made available to the court or any of the parties on request. I make reference to the reports to

demonstrate the consequences and irreparable harm that will arise if the mining activity commences.

62. The ecological assessment conducted by NSS, AAV's own consultant, concludes at page 269 with the finding that the Yzermyn project:

"is fatally flawed, and should be NO GO in terms of Biodiversity. This is largely because of the impact of the proposed underground mining on the supply of water to the surface water resources (due to the dewatering activities) and the potential groundwater contamination. These aspects will have a significant impact on aquatic and wetland ecosystem functioning and biodiversity in a far greater area than the underground mining area. These and other aspects of the mining project are in strong conflict with international, national and provincial legislation, policies and guidelines. A high number of Conservation Important species were detected, and most habitat in the proposed underground mining and surface infrastructure areas was assigned a Very High or High sensitivity".

63. These significant impacts were confirmed by the coalition's independent reviews. I provide an overview of each area of harm arising from the mining activity below.

Harm to Strategic Water Source Area

64. There are severe risks and consequences posed by the construction and proposed mining activity at the Yzermyn mine. The two most severe consequences are the dewatering of aquifers and the decant of contaminated groundwater and acid mine drainage. These impacts must be considered in the light not only of the sensitive ecosystems in the proposed mining area (see above), but also with regard to the impact on downstream water users. This at a time following severe drought conditions over the whole of South Africa during

which it has become apparent that the country faces on-going critical water shortages in the face of a rapidly growing population.

Dewatering of the aquifers

65. There are three aquifer systems underlying the mining footprint: localised perched aquifer systems, a shallow weathered Karoo aquifer system and a deep fractured Karoo aquifer system.
66. AAV intends to conduct its underground mining activities in the deep aquifer. Digging out the deep aquifer would create an inflow of groundwater into the underground mine workings. During the construction and operational phases of the mine, the groundwater will be pumped out of the underground workings. After the cessation of operations, the inflow would be allowed to occur and, over time, the mine voids would fill up/flood.
67. The groundwater inflow and pumping will result in reduced groundwater levels in the aquifers above and in the vicinity of the mine. This is also called the 'dewatering' of the aquifers.
68. The NSS ecological assessment assessed the consequent impacts of the dewatering of the aquifers on the wetlands in the surface and underground mining areas and reported the following findings:
 - 68.1. *"This lowering in groundwater level will have a negative impact on all wetlands fed by the shallow aquifer and the springs within the cone of depression. These springs are one of the main sources of water for the wetlands in the area, supplying water during the drier winter months when the wetlands are not fed by rainfall. As the source of water*

supplying the wetlands is unknown, and the fact that the groundwater levels will be lowered in the shallow and deeper aquifers, one must assume that the wetlands within the cone of depression will be impacted upon and may possibly dry out.” (NSS Report; pgs 243 and 246)

68.2. *“The decrease in water input to the wetlands within the study area and surrounds, and the resultant reduction in flow, and potential drying up of wetlands will have a HIGH significance on Biodiversity as a minimum of 40% of the underground mining area and surface infrastructure footprint area constitutes wetland habitat. The impact will also extend into and beyond the greater mine lease area.” (NSS Report; pgs 243 and 246)*

68.3. *“The loss or deterioration of the wetlands will extend beyond the study area and will extend into the wetland FEPAs within the mine lease area and the wetland FEPAs and Wetland Clusters in the immediate surrounds ... These systems are also the start of the catchment that feeds the Assegai River FEPA, and a decline in water input will, therefore, result in a decrease in flow of this river system.” (NSS Report; pg 246)*

68.4. *“Approximately 40% [of the vegetation communities identified] within the mine lease area are moisture dependent. ... If the dewatering activities have a major effect on the wetland systems identified, these vegetation communities and the potential Conservation Important species found within these habitats will be affected and may change in structure in the long term.” (NSS Report; pg 251)*

- 68.5. *"Due to the HIGH and long-term (if not irreversible) status of this impact in an area far exceeding the study area, the project should be a NO GO."*
(p253) NSS records this impact as having a 'HIGH' significance both without mitigation and with mitigation." (NSS Report; para 4.2, pg 242)

Decant of contaminated groundwater and acid mine drainage

69. The NSS ecological assessment reports that:

- 69.1. *"[Acid mine drainage] represents the most severe impact of coal mining on water resources. ... The elevated location of the mine will lead to drainage of contaminated water away from the mine. Since the ... mine will be located in the headwaters of the Assegai River ... it will threaten more than one water resource and thus users ... in the lower catchment".*
(NSS Report; pg 255)
- 69.2. Contamination of groundwater will impact on surface water quality downstream. *"This contamination will impact on the PES of the wetlands and the eco-services the wetland sic can provide, the main one of which is the maintenance of Biodiversity."* (NSS Report; pg 255)
- 69.3. *"Severe deterioration in [water quality] can lead to a dramatic decrease in aquatic biota and ceased aquatic ecosystem functionality."* (NSS Report; pg 256)
- 69.4. *"Impacts of ... contamination on faunal species can include aspects such as a decline in general health, reduction in fecundity rates and birth defects."* (NSS Report; pg 259)

69.5. The anticipated impact of decant of contaminated groundwater and the resultant impacts on surface water quality, wetlands, aquatic ecology and biodiversity is of 'HIGH' significance (NSS's highest significance rating) both without mitigation and with mitigation (in other words, NSS regards mitigation of this impact as being impossible). (NSS Report; pg 254)

Impact on flora and fauna

70. NSS found that the construction of the mine surface infrastructure, the mining activities and the resultant impact on the groundwater will affect the following vulnerable species found in the proposed mining area:

70.1. six floral species at a high risk of extinction in the wild were found by NSS in the study area, and 30 species which are listed as Protected Species under the Mpumalanga Conservation Act, 10 of 1998 have been found during surveys of the mining area; (NSS Report; pgs 53-58 and 64-65)

70.2. twenty-one Conservation Important mammals have been recorded previously in the proposed mining area, and eight Conservation Important mammal species, including one Endangered and five Near Threatened species, were found there by NSS; (NSS Report; pgs 95-99)

70.3. eighteen Conservation Important bird species have been recorded in or near the proposed mining area, and NSS observed five Conservation Important species during surveys related to the project; (NSS Report; pgs 100-103)

70.4. several globally, nationally or provincially Near Threatened reptiles and frogs are also likely to occur at the site; (NSS Report; pgs 104-106) and

70.5. the mine will fall within an Important Bird Area identified by BirdLife International, which is considered to be "*one of the most important IBAs in Africa and ... vital for the conservation of a number of locally- and globally-threatened bird species, as well as the conservation of other fauna and flora*". (NSS Report; pg 213)

Harm to local communities

71. The greatest environmental impact of the mine is likely to be felt by vulnerable and disadvantaged persons in the area, namely subsistence farmers and poor rural communities who depend on the natural soil and water resources in the area to sustain themselves.

72. Water is sourced by farmers in the area from springs which are used for both domestic and livestock watering purposes. There are twenty-three such springs in the project area. The springs are also a water source for the wetlands. The dewatering of the aquifers will have a negative impact on these springs and the people who rely on them.

73. There are approximately eight homesteads situated on the proposed mining site which are occupied by low-income families with between eight and thirty people living in each homestead. The households generally rely on limited income from a single family member who works on the host farm, as well as on social grants. This community "*is vulnerable from a livelihood perspective, as they do not have access to finances or other resources should their current income come to an*

end (i.e. farm work) or access to natural resources, such as water and grazing land, be prevented”.

74. Allowing even part of this damage to occur would be seriously harmful to the environment. In so far as the initial phase of the mining may be confined to the clearing of the indigenous vegetation to make way for the surface infrastructure, it is well known that re-establishing grasslands to their natural state is very difficult if not impossible. If mining is allowed to continue but then ultimately stopped when the legal processes are complete, a damaged environmental scar will be left on the edge of the protected area.
75. All of these considerations render the matter extremely urgent. They also show that the coalition has a reasonable apprehension of injury to the environment if the interdict is not granted.
76. I refer to the confirmatory affidavits of Ms Catherine Horsfield and Ms Thobeka Gumede confirming what is set out above in relation to the exchange of correspondence and the information regarding the undertaking given by AAV to the sixth respondent not to proceed with mining until the EA statutory appeal had been finalised (now denied by AAV).

**A CLEAR RIGHT: AAV CANNOT LAWFULLY COMMENCE MINING ACTIVITY
UNTIL THE FINALISATION OF THE STATUTORY APPEAL**

77. On 7 June 2016 the Chief Director of the Mpumalanga Department of Agriculture, Rural Development, Land and Environmental Affairs (“**MDARDLEA**”) granted an EA in terms of NEMA to AAV in respect of the Yzermyn mine. A copy of the letter advising AAV of the approval and the approved EA is attached as Annexure **FA9**.

78. On 19 August 2016 the coalition lodged an appeal in terms of section 43(2) of NEMA and regulation 61 of the Environmental Impact Assessment Regulations, 2010 against the grant of the EA with the Member of the Executive Council: Agriculture, Rural Development, Land and Environmental Affairs, Mpumalanga.
79. It did so in terms of section 43(2) of NEMA which provides: *"Any person may appeal to an MEC against a decision taken by any person acting under a power delegated by that MEC under this Act or a specific environmental management Act."*
80. Since its amendment with effect from 2 September 2014, section 43(7) of NEMA provides that *"[a]n appeal under this section suspends an environmental authorisation, exemption, directive, or any other decision made in terms of this Act or any other specific environmental management Act, or any provision or condition attached thereto."* This amendment pre-dated both the EA and the lodging of the coalition's EA statutory appeal and therefore applies to the EA statutory appeal.
81. The coalition's EA statutory appeal therefore suspends the EA. In the absence of an operative EA, AAV may not lawfully commence mining activities for the reasons given in paragraph 6 above.
82. The fourth respondent invited the coalition and AAV to make oral representations in respect of the statutory appeal, to facilitate his reaching a decision on the appeal. A hearing was scheduled for 13 and 14 June 2017 but was postponed by the fourth respondent until a date to be agreed in September 2017. The statutory appeal is therefore still pending.

A CLEAR RIGHT: AAV CANNOT LAWFULLY COMMENCE MINING ACTIVITY UNTIL THE CHANGE OF LAND USE IS AUTHORISED UNDER SPLUMA

Permissible land uses under SPLUMA

83. SPLUMA came into force on 1 July 2015. It provides a framework for spatial planning and land use management in South Africa in the form of development principles, spatial development frameworks ("**SDFs**"), land use schemes and procedures and processes for the preparation, submission and consideration of land development applications.
84. In terms of section 2(1) of SPLUMA it "*applies to the entire area of the Republic*". In terms of section 2(2) of SPLUMA, save where the Act allows it, "*no legislation not repealed by this Act may prescribe an alternative or parallel mechanism, measure, institution or system on spatial planning, land use, land use management in a manner inconsistent with this Act.*"
85. Chapter 5 of SPLUMA regulates land use management. In terms of section 24(1) of SPLUMA each municipality must adopt a single land use scheme ("**LUS**") for its entire area within 5 years from the commencement of SPLUMA. A LUS is the municipality's chief land use management instrument, which provides for all land use and development rights.
86. Section 26(1) of SPLUMA then provides that an approved LUS has the force of law and binds all owners and users of land as well as organs of state.
87. Sections 26(2) - (4) of SPLUMA, provide in relevant part, as follows:

"(2) Land may be used only for the purposes permitted –

- (a) *by a land use scheme;*
- (b) *by a town planning scheme, until such scheme is replaced by a land use scheme; or*
- (c) *in terms of subsection (3).*

(3) *Where no town planning or land use scheme applies to a piece of land, before a land use scheme is approved in terms of this Act such land may be used only for the purposes listed in Schedule 2 to this Act and for which such land was lawfully used or could lawfully have been used immediately before the commencement of this Act.*

(4) *A permitted land use may, despite any other law to the contrary, be changed with the approval of a Municipal Planning Tribunal in terms of this Act."*

88. With reference to subsection (2)(b), a town planning scheme is a reference to a town planning scheme under legislation preceding SPLUMA.

89. With reference to subsection (3), Schedule 2 includes a wide range of different purposes listed in item 1 of the Schedule and defined in item 2. Those relevant for present purposes are -

89.1. agricultural purposes, defined as "*purposes normally or otherwise reasonably associated with the use of land for agricultural activities, including the use of land for structures, buildings and dwelling units reasonably necessary for or related to the use of the land for agricultural activities*";

89.2. conservation purposes, defined as *"purposes normally or otherwise reasonably associated with the use of land for the preservation or protection of the natural or built environment, including the preservation or protection of the physical, ecological, cultural or historical characteristics of land against undesirable change or human activity"*; and

89.3. mining purposes, defined as *"purposes normally or otherwise reasonably associated with the sue of land for mining"*.

90. There is no land use scheme in place in the municipal area in which the properties that are subject to AAV's intended mining operations are located. The only town planning scheme in place is that pertaining specifically to the town of Volksrust. It does not apply to the area in which AAV's mining operations will take place.

91. In those circumstances, section 26(3) of SPLUMA applies to the land on which the mining operations are intended to take place. The lawful land uses in respect of the properties on which AAV's mining operations are intended to take place at the commencement date of SPLUMA on 1 July 2015 were for agricultural purposes and, additionally in respect of the properties falling within the Mabola Protected Environment, conservation.

92. During 2016 and 2017 the coalition's attorneys obtained certificates reflecting the permitted land use for most of the properties from the Local Municipality. Copies of the certificates are attached as Annexure **FA10**. They refer to the permitted land use exclusively as agriculture. This is correct, although in respect of the properties falling within the Mabola Protected Environment, they ought also to

have referred to conservation. The Mabola Protected Environment was declared on 22 January 2014, before the commencement of SPLUMA and its protected status contemplates as lawful uses both agriculture and conservation.

93. In any event, even if agricultural purposes were the only land use permitted, mining would not constitute a lawful use.
94. A permitted land use as contemplated in section 26(3) of SPLUMA read with Schedule 2 may be changed with the approval of a Municipal Planning Tribunal in terms of section 26(4) of SPLUMA, read with regulation 18 of the Spatial Planning and Land Use Management Regulations: Land Use Management and General Matters, 2015.¹ I will refer to them as the SPLUMA Regulations.

¹ 18 Application where no town planning scheme or land use scheme applies

(1) The owner of land located in a municipal area where no town planning scheme or land use scheme applies to that piece of land, if such owner wants to change the purpose of the land use from that which it is lawfully used for in terms of Schedule 2 of the Act to another purpose listed in that Schedule or formalise an existing lawful land use; the owner or such other person as referred to in section 45(1) of Act, must apply to the municipality in whose municipal area that land is located-

- (a) if there is a town planning scheme, for an incorporation of the land use in the town planning scheme; or
- (b) if there is no town planning scheme or land use scheme, for a change of the land use.

(2) An application referred to in subregulation (1) must, amongst others, contain the following information:

- (a) a description of the land to which the application relates;
- (b) the land use requested and the reason therefor; and
- (c) any other information that the municipality may require.

(3) The municipality must, if an application is received as contemplated in subregulation (1), determine whether the land to which the application relates was lawfully used or could have lawfully been used for a purpose listed in Schedule 2 of the Act.

(4) The public participation procedures and the intergovernmental participation procedures for an application in terms of this Regulation are the same as determined by the municipality for a land development and land use application.

(5) The municipality must refer an application contemplated in subregulation (1) to the Municipal Planning Tribunal or authorised official for consideration and decision.

(6) The Municipal Planning Tribunal or authorised official must consider, amongst others, the following when deciding an application-

- (a) whether that application is in conflict with the municipal spatial development framework;
- (b) whether or not the approval of the application is in conflict with or will impact negatively on the land uses of the pieces of land in the area surrounding the land to which the application relates;
- (c) whether the land to which the application relates is or is part of high potential agricultural land; and

95. In seeking such a change, there must also be compliance with the Spatial Planning and Land Use Management By-Law for the Dr. Pixley Ka Isaka Seme, Lekwa, Mkhondo and Msukaligwa Local Municipalities (Proclamation 8 in Provincial Gazette 2683 of 22 April). A copy will be made available at the hearing of the matter. I will refer to it as the SPLUMA by-law.

AAV's attempts to re-zone Portion 1 of the farm Yzermyn 96 HT

96. On 6 January 2017 the following advertisement appeared in the Volksrust Recorder:

"Dr. Pixley Ka Seme Local Municipality application for amendment of the relevant town-planning scheme and in terms of section 66 of an applicable Pixley Ka Seme Municipal Planning Land Use by-law and in terms of Spatial Planning and Land Use Management Act 16 of 2013 (SPLUMA) for the rezoning of portion 1 of the Farm Yzermyn 96 HT.

We, Uphondolwendlovu Town Planners (Pty) Ltd, being the authorized agent of the owner of portion 1 of the farm Yzermyn 96 HT, Province of the Mpumalanga hereby gives notice for the amendment of the relevant town-planning scheme in terms of section 66 of Dr Pixley Ka Seme Municipal Planning Land Use bylaw and in terms of Spatial Planning and Land Use Management Act 16 of 2013 (SPLUMA) from agriculture to mining for the purpose of coal mining. Particulars of the application will lie for inspection during normal office

(d) whether granting the application will formalise an existing lawful land use.

(7) The municipality must keep a record of decisions made by the Municipal Planning Tribunal and authorised official in terms of subregulation (1)(b) and the land use scheme, when developed, must reflect the land use approved by the Municipal Planning Tribunal and the authorised official.

hours at the office of the municipal manager, Dr Adelaide Tambo and Dr Nelson Mandela Drive, Volkstrust, 2470.

Any person, who wishes to object to the application or submit representations in respect thereof, must lodge the same in writing to the above mentioned address within the prescribed notice dates and those who cannot write may during office hours come to the address stated in the notice where a staff member will assist those persons by transcribing their objections, comments or representations. a person who submits objections, comments or representations will be notified if a hearing will be held in respect of the application.

The advertisement will be there for a period of 21 days from 28th of December 2016 to 25th of January 2017.

Address of the agent: Uphondolwendlovu Town Planners (Pty) Ltd, 1746 Station Street, Balfour, 2410."

97. On 25 January 2017, the coalition's attorneys addressed a letter to the Municipal Manager of the Local Municipality, a copy of which is annexed marked **FA11**. I ask that it be read as if incorporated in this affidavit. In the letter, it was pointed out that the notice was deficient in numerous respects and therefore invalid, particularly with reference to the SPLUMA by-law –

97.1. The period for the submission of comments was incorrect;

97.2. The notice failed to give the required details of the applicant;

97.3. The notice failed to give the contact details of the relevant municipal employee;

97.4. The notice had not lain for the proper period of inspection;

- 97.5. In conflict with the notice and the requirements of the SPLUMA by-law, access to the application had not been allowed for purposes of commenting, despite extensive efforts on the part of the coalition's attorneys to try to gain access to the application for purposes of commenting on it.
98. Apart from pointing out that the notice was invalid, the letter also set out the coalition's substantive objections to the change of land use.
99. AAV responded in a letter dated 27 January 2017 (Annexure **FA12**). They sought to defend the process followed, but in doing so *inter alia* resorted to attacking the coalition's attorneys and referring to incorrect provisions of the SPLUMA regulations.
100. The coalition's attorneys responded in a letter of 30 January 2017 (Annexure **FA13**). The attorneys stood by their letter of 25 January 2017 and pointed out that the municipal manager's refusal to allow access to the application to be commented on was a breach of the coalition's rights to fair administrative action.
101. On 3 February 2017 another advertisement appeared in the Volksrust Recorder, as follows:

"Dr. Pixley Ka Seme Local Municipality

Application for amendment of the relevant townplanning scheme and in terms of section 66 and 77 of an applicable Pixley Ka Seme Municipal Planning Land Use by-law and in terms of Spatial Planning and Land Use Management Act 16 of 2013 (SPLUMA) for the rezoning of portion 1 of the farm Yzermyn 96 HT.

We, Uphondolwendlovu Town Planners (Pty) Ltd, being the authorized agent of the mining right holder on portion 1 of the farm Yzermyn 96 HT, province of the Mpumalanga hereby gives notice for the amendments of the relevant town-planning scheme and in terms of section 66 Dr Pixley Ka Seme municipal planning land use by-law and in terms of spatial planning and land use management act 16 of 2013 (SPLUMA) from agriculture to mining for the purpose of coal mining. Particulars of the application will lie for inspection during normal office hours at the offices of the municipal manager, Dr Adelaide Tambo and Dr Nelson Mandela Drive, Volkstrust, 2470. Any person, who wishes to object to the application or submit representations in respect thereof, must lodge the same in writing to the above mentioned address within the prescribed notice dates and those who cannot write may during office hours come to the address stated in the notice where a staff member will assist those persons by transcribing their objections, comments or representations. A person who submits objections, comments or representations will be notified if a hearing will be held in respect of the application. The advertisement will be there for a period of 21 days from 28th of December 2016 to 25th of January 2017. Address of the agent: Uphondolwendlovu Town Planners (Pty) Ltd, 1746 Station Street, Balfour, 2410.

Email: uphondolwendlovutownplanner@gmail.com

102. On 15 February 2017 the coalition's attorneys addressed another letter to the Municipal Manager, a copy of which is annexed marked **FA14**. The letter pointed out *inter alia* the following in relation to the notice of 3 February 2017:

102.1. It suffered from similar defects to the earlier notice;

102.2. It provided for fewer than the requisite 30 days for the submission of comments or objections;

- 102.3. Comments were to be made by a date that had already passed;
- 102.4. It did not comply with the public participation requirements stipulated by section 18(4) of the SPLUMA regulations;
- 102.5. It did not lie for inspection for the advertised period, if at all; and
- 102.6. the coalition and its attorneys had been unable to obtain a copy of the application.
103. Of particular importance is that it was pointed out in the letter that there was no town-planning scheme in existence in respect of the land subject to the application, as provided for in the notice. Any land use and the change was, rather, regulated by section 26(3) and (4) of SPLUMA.
104. On 20 April 2017, the Local Municipality sent a letter to Uphondolwendlovu, the agent for AAV. The Local Municipality clearly accepted that the process followed by the agents for AAV to that point had been fatally flawed. It therefore (correctly) advised AAV's agent to re-apply for a land use change in terms of the regulation 18 of the SPLUMA regulations. A copy of that letter is attached as Annexure **FA15**.
105. On 14 June 2017 the coalition's attorneys sent the letter attached as Annexure **FA16** to the Local Municipality asking them to notify our attorneys of any application for land use change received (past, as well as future) in respect of Portion 1 of the farm Yzermyn 96 HT, Goedgevonden 95 HT, Kromhoek 93 HT and Zoetfontein 94 HT.

106. On the morning of 19 June 2017, Ms Zahra Omar, a candidate attorney at the coalition's attorneys whose confirmatory affidavit is attached, had a telephonic discussion with Mr Skhumbuzo Makhubu, a Senior Town Planner at the Local Municipality, about the letter and obtained the following information:

106.1. The Local Municipality has received an application for land-use change, apparently a fresh application, in respect of Portion 1 of the Farm Yzermyn 96 HT;

106.2. The Local Municipality has taken the application to the "District Planning Tribunal";

106.3. The Local Municipality has not received any applications in respect of Goedgevonden 95 HT, Kromhoek 93 HT or Zoetfontein 94 HT; and

106.4. There was no suggestion that the Tribunal had decided or processed the application.

107. The reference to the "District Planning Tribunal" is to the Gert Sibande District Municipal Planning Tribunal (as contemplated in section 26(4) of SPLUMA, quoted above). In terms of a notice in the Mpumalanga Provincial Gazette, the Gert Sibande District Municipal Planning Tribunal commenced its operations on 15 April 2016 and has jurisdiction over the Dr. Pixley Ka Isaka Local Municipality. A copy of the notice is attached as Annexure **FA17**.

108. Neither the coalition nor its attorneys are aware of notice having been given of any fresh application in terms of section 26(4) of SPLUMA, read with regulation 18 of the SPLUMA Regulations.

109. To summarise, in the present circumstances –

109.1. all of the properties covered by AAV's mining right, including the farm on which the surface infrastructure is to be established and the farms where the underground mining will take place, are restricted to use for agricultural and in some instances both agricultural and conservation purposes;

109.2. Mining is therefore not permitted under SPLUMA on any of the properties on which mining is to take place whether above or below ground;

109.3. It is an offence in terms of section 58(1) of SPLUMA to use land contrary to a permitted land use and to alter the form and function of land without the prior approval in terms of SPLUMA for such alteration;

109.4. The only land in respect of which any application for a change of land use has been received is in respect of Portion 1 of Yzermyn 69HT, where the surface infrastructure is to be established;

109.5. That application has not, to the best of our knowledge, been subject to any form of advertisement for purposes of public notice, nor has it been subjected to any public participation process; and

109.6. That application has not been determined by the Municipal Planning Tribunal having jurisdiction to decide on a change of land use in terms of section 26(4) of SPLUMA.

110. In the circumstances, the commencement of mining activity on any of the land subject to the mining right is unlawful with reference to SPLUMA.

INTERDICTIONARY RELIEF

111. The coalition respectfully contends that it is entitled to an interdict as provided for in the notice of motion preventing AAV from commencing with the mining and related preparatory, ancillary and incidental activities until at least the time when –

111.1. The statutory appeal in respect of its EA has been decided in its favour;
and

111.2. The Municipal Planning Tribunal having jurisdiction in terms of section 26(4) of SPLUMA has approved a change of land use in respect of the land subject to both the surface and underground mining and related activities.

112. I am advised that in order to succeed, the coalition must demonstrate the above Honourable Court:

112.1. a clear right;

112.2. a reasonable apprehension of irreparable harm if an interdict is not granted;

112.3. the applicant must have no other remedy.

The clear right

113. I have demonstrated above that the commencement of mining activities would be unlawful with reference to both NEMA and SPLUMA and would additionally constitute criminal offences. The coalition accordingly has a clear right.

Irreparable harm

114. Should the interdict not be granted, the commencement of mining activities will cause irreparable harm to the Mabola Protected Environment and the surrounding eco-systems.

115. I have explained in detail above, under the relevant heading, that the effect of coal mining in such a strategically important and ecologically sensitive area would be disastrous. It would result in unacceptable water pollution, ecological degradation and damage to the environment.

No satisfactory alternative remedy

116. The issue of damages as an alternative remedy does not arise in these circumstances.

117. There is no satisfactory or adequate alternative remedy.

118. AAV's proposed conduct is unlawful. I am advised that this Court will not deprive the coalition of a remedy that interdicts AAV from taking further unlawful steps. The coalition is not required to wait until AAV commences with the mining activity before approaching the court for relief.

Alternative bases for relief

119. Even if this court is not satisfied as to the coalition's clear right, it is submitted that it has made out the requirements for purely interim relief, pending the statutory appeal under NEMA and the application for a change of land use under section 26(4) of SPLUMA. In this regard, the coalition has at least shown—

119.1. A prima facie right;

119.2. A well-grounded apprehension of irreparable harm if the interim relief is not granted and the ultimate relief is eventually granted – proper and complete restoration of an ecologically sensitive environment to its pristine condition is known to be impossible;

119.3. The balance of convenience favours the coalition, particularly if regard is had to the fact that it acts in the public interest and the public interest has a very real concern in *inter alia* the protection and maintenance of South Africa's rapidly diminishing and deteriorating water supplies and in the proper protection of areas statutorily declared as protected environments. This serious and irreparable harm must be weighed against the prejudice to AAV if the mining activities are delayed until the finalisation of the EA statutory appeal and a competent change in the land use of the proposed mining area. The prejudice to AAV is minimal, and can be mitigated by requesting the necessary extension from the Minister for commencement of the mining activities; and

119.4. There is no other satisfactory remedy. The reasons for this have already been given above.

120. Alternatively, to the extent that AAV might contend that it has been prejudiced in meeting the applicants' case as a result of the urgency with which this application has been brought, the coalition will seek interim relief in the form of a rule nisi with an interim interdict pending the outcome of an application for final relief on the same terms.

CONCLUSION

121. In the circumstances, the applicants pray for an order in terms of the notice of motion.



SVEN EATON PATRICK PEEK

The Deponent has acknowledged that he/she knows and understands the contents of this affidavit, which was signed and sworn to or solemnly affirmed before me

at _____ on this the _____ day of **JUNE 2017**, the regulations contained in Government Notice No. R1258 of 21 July 1972, as amended, and Government Notice No. R1648 of 19 August 1977, as amended, having been complied with.



COMMISSIONER OF OATHS

Full Names: *FREDERICK JOHAN RIEKERT*

Capacity:

Designation:

Address:

FREDERICK JOHAN RIEKERT
COMMISSIONER OF OATHS
CHARTERED ACCOUNTANT (SA)
VICTORIA COUNTRY CLUB ESTATE
170 PETER BROWN ROAD
PIETERMARITZBURG, 3201
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