IN THE HIGH COURT OF SOUTH AFRICA

(NORTH GAUTENG, PRETORIA)

CASE NO: 68161/2008

(1) REPORTABLE: ~~YES~~ / NO

(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO

(3) REVISED.

2012.06.29
DATE

SIGNATURE

In the matter between:

HARMONY GOLD MINING COMPANY LIMITED	Applicant
and	
REGIONAL DIRECTOR: FREE STATE, DEPARTMENT OF WATER AFFAIRS	First Respondent
NATIONAL MANAGER: COMPLIANCE, MONITORING AND ENFORCEMENT UNIT OF THE DEPARTMENT OF WATER AFFAIRS	Second Respondent
MINISTER OF WATER AND ENVIRONMENT AFFAIRS	Third Respondent
ANGLO GOLD ASHANTI LIMITED	Fourth Respondent
SIMMER AND JACK MINES LIMITED	Fifth Respondent
SIMMER AND JACK INVESTMENTS (PTY) LTD	Sixth Respondent
STILFONTIEN GOLD MINING COMPANY LIMITED (in liquidation)	Seventh Respondent

JUDGMENT

MAKGOKA, J:

[1] This application concerns a directive issued in terms of s 19(3) of the National Water Act, 36 of 1998 (the NWA). The section applies whenever there is land (the affected land) on which any pollution-forming activity or process takes or has taken place. S 19(1) of the NWA imposes duties on owners, controllers, occupiers or users (landholders) of such land to take certain measures to prevent or control pollution. The primary issue is whether a directive issued in terms of s 19(3) becomes invalid once a person ceases to be a landholder.

[2] The first to third respondents sought condonation for the late delivery of their answering affidavit. The Deputy Judge President had given a directive that the condonation application be set down and determined prior to the hearing of this application. However, the first to third respondents failed to comply with that directive, with the result that I was seized of that application. I formed a view that a proper case had been made out for condonation. In any event, the application for condonation was not seriously resisted by the applicant at the hearing.

[3] Back to the main application. The power to issue a directive in terms of s 19(3) vests in a management catchment agency. In areas for which a catchment management agency has not been established, or is not functional, all the powers of the catchment agency are exercised by the Minister of Water Affairs[1] in terms of

[1] The department formerly incorporated Forestry and was known as the Department of Water Affairs and Forestry. Since May 2009 it has existed as a separate department from the Department of Environmental Affairs, within the Ministry of Water and Environmental Affairs.

s 72(1) of the NWA. In the Kosh area, there was no management catchment agency, and the Minister delegated (as she is entitled to) her powers to the first respondent, the Regional Director. I use the word 'delegated' in a very guarded manner, and solely for convenience purposes, as there is controversy around the purported delegation. That will become clear later. Accordingly, reference in relation to the powers in s 19(3), shall be to the Minister. Where reference is made to the first and second respondent, collectively with the Minister, the designation shall be 'the Department'.

[4] The directive has its genesis in the gold mining activities in the mining towns of Klerksdorp, Orkney, Stilfontein and Hartebeesfontein (Kosh area). It is common cause that the gold mining activities conducted by the mining houses (including the applicant) are a source of potential pollution to the underground water in the area. In order to address the pollutive effect of the mining activities in the area, the Department of Environment and Water Affairs (the Depatment) issued a series of directives in terms of s 19(3) during 2005 to each of the mining houses. They were required to take certain measures to prevent the pollution of water in their mines.

[5] The directive in issue is the latest of those directives. It was issued on 1 November 2005. It was to operate until the applicant and other mining houses had reached agreement on the long term management of water arising from mining activities in the Kosh area. Pending the implementation of such agreement, the mining houses were obliged to (i) manage, collect, treat, use or dispose of subterranean water that might affect the current and future operations of mines in the area, and (ii) share the costs of taking these measures equally. The agreement

envisaged in the directive was to be submitted by the parties to the first respondent within 21 days from the date of issue. It is common cause that the agreement was never concluded.

[6] The factual background is simple and largely common cause. During September 2003 the applicant acquired all the shares in African Rainbow Minerals Gold Ltd (Armgold). It thereafter managed Armgold's mining operations and exercised control over the land in doing so. The ownership of the land however remained vested in Armgold. On 29 August 2007 Armgold sold the mine, including the land, to Pamodzi Gold Orkney (Pamodzi). The sale became unconditional and was implemented in February 2008. From that period the applicant ceased to manage the mine and no longer exercised control over the land on which the mine was based, as Pamodzi assumed all of the applicant's obligations in respect of the mining operations.

[7] Armgold transferred the land to Pamodzi on 6 January 2009. On 20 March 2009 Pamodzi was placed in provisional liquidation. On 25 May 2009 the applicant wrote a letter to the Department, and copied the interested parties, wherein it expressed a view that as of February 2008, the directive was no longer valid against it, but against Pamodzi. It further gave notice of its intention to cease its contribution to the costs of water pumping and treatment with effect from 30 June 2009. The other mining houses did not agree with the applicant's position. Efforts to resolve the impasse fell through. On 28 August 2009 the applicant requested the Department to withdraw the directive against it, contending that it no longer fell within the ambit of s19(1) of the Act, as it was no longer the landholder of the affected land. On

21 September 2009 the Department refused the applicant's request. Aggrieved by that refusal, the applicant now approaches this court for relief.

[8] The applicant seeks, in the main, an order reviewing and setting aside the directive issued to it on 1 November 2005. The applicant also asks condonation for the late launching of the application. In the alternative the applicant seeks to review and set aside the decision of the Department on 21 September 2009 not to withdraw the directive against it. As a corollary, and flowing from the above, the applicant seeks a declaratory order that the directive became invalid on 6 January 2009 (it should be February 2008) when it ceased to operate any mining activity on the affected land. With the exception of the fourth and seventh respondents, the relief sought by the applicant is opposed by the rest of the respondents. It is convenient to dispose of the relief sought in the main.

[9] The applicant submitted that, given its argument that the directive became invalid against it from 6 January 2009, I should, independently of the Promotion of Administrative Justice Act 3 of 2000 (PAJA) exercise the powers conferred on this court by s 172(1)(b) of the Constitution[2] and consider the application on the basis of the legality principle. The applicant made this submission on the authority of the *obiter* remarks in *Diggers Development (Pty) Ltd v City of Matlosana*[3] to the effect that if the principle of legality is found to have been breached, it is not necessary to consider neither of the two requirements of s 7 of PAJA, namely that the application

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[2] Constitution of the Republic of South Africa Act 108 of 1996

[3] 2010 JDR 0214 (GNP) para 80.

be instituted without unreasonable delay and after internal remedies had been exhausted. Without necessarily accepting the correctness of the *obiter* remarks in *Diggers Development*, I accept the invitation.

[10] I commence by considering s 19 of the NWA. It provides:

> An owner of land, a person in control of land or a person who occupies or uses the land on which-
>
> (a) any activity or process is or was performed or undertaken; or
>
> (b) any other situation exists, which causes, has caused or is likely to cause pollution of a water resource, must take all reasonable measures to prevent any such pollution from occurring, continuing or recurring.
>
> (2) The measures referred to in subsection (1) may include measures to –
>
> (a) cease, modify or control any act or process causing the pollution;
>
> (b) comply with any prescribed waste standard or management practice;
>
> (c) contain or prevent the movement of pollutants;
>
> (d) eliminate any source of the pollution;
>
> (e) remedy the effects of the pollution; and
>
> (f) remedy the effects of any disturbance to the bed and banks of a watercourse.
>
> (3) A catchment management agency may direct any person who fails to take the measures required under subsection (1) to-
>
> (a) commence taking specific measures before a given date;
>
> (b) diligently continue with those measures; and
>
> (c) complete them before a given date.
>
> (4) Should a person fail to comply, or comply inadequately with a directive given under subsection (3), the catchment management agency may take the measures it considers necessary to remedy the situation.
>
> (5) Subject to subsection (6), a catchment management agency may recover all costs incurred as a result of it acting under subsection (4) jointly and severally from the following persons:
>
> (a) Any person who is or was responsible for, or who directly or indirectly contributed to, the pollution or the potential pollution;

(b) the owner of the land at the time when the pollution or the potential for pollution occurred, or that owner's successor-in-title;

(c) the person in control of the land or any person who has a right to use the land at the time when-

i. the activity or the process is or was performed or undertaken; or
ii. the situation came about; or

(d) any person who negligently failed to prevent-

i. the activity or the process being performed or undertaken; or
ii the situation from coming about.

(6) The catchment management agency may in respect of the recovery of costs under subsection (5), claim from any other person who, in the opinion of the catchment management agency, benefited from the measures undertaken under subsection (4), to the extent of such benefit.

(7) The costs claimed under subsection (5) must be reasonable and may include, without being limited to, labour, administrative and overhead costs.

(8) If more than one person is liable in terms of subsection (5), the catchment management agency must, at the request of any of those persons, and after giving the others an opportunity to be heard, apportion the liability, but such apportionment does not relieve any of them of their joint and several liability for the full amount of the costs.

[11] It is not in dispute that the existence of a particular relationship between the landholder and the affected land is a jurisdictional prerequisite for the issuing of a valid directive under s 19(3) of the Act. Put differently, it is common cause that the Minister's directive-issuing power in terms of s 19(3) is limited to a landholder. However, the applicant contends that the Minister's power is further limited to the extent that the Minister may only direct the landholder to take preventive measures for as long as it remains the landholder.

[12] The primary question is therefore whether the continuance of the particular relationship between the landholder and the affected land is also required for its ongoing validity. As stated above, the applicant ceased mining operations on the

affected land in February 2008. According to the applicant, as of that date, the directive became invalid and fell away by operation of law. This contention is rejected by the respondents.

[13] The starting point in the interpretation of a statutory provision remains an endeavour to ascertain the intention of the legislature from the words used in the enactment. Those words must be accorded their ordinary, literal, grammatical meaning and a court may depart from that meaning only where to do so 'would lead to an absurdity so glaring that it could never have been contemplated by the legislature, or where it would lead to a result contrary to the intention of the legislature, as shown by the context or by such other considerations as the court is justified in taking into account ...' *Venter v Rex.*[4] See also *Randburg Town Council v Kerksay Investments (Pty) Ltd*[5].

[14] The fifth paragraph of the preamble to the NWA recognises the need to protect the quality of water resources to ensure sustainability of the nation's water resources in the interest of all water users. The purpose of the NWA is stated in s 2 to be to ensure that the nation's water resources are, among others, conserved and managed so as to take into account reduction and prevention of pollution and degradation of water resources.

[15] Where pollution and degradation of the environment are in issue, as is the case here, one must also consider s 24 of the Constitution, and the provisions of the National Environmental Management Act 107 of 1998 (NEMA). S 24 of the

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[4] 1907 TS 910 – 915.

[5] 1998 (1) SA 98 (SCA) at 107B-G).

Constitution confers the right to an environment which is not harmful to one's health and to environmental protection by reasonable legislative and other measures that, among others, prevent pollution and ecological degradation. Of particular relevance in NEMA, is s 28, which provides:

> (1) Every person who causes, has caused or may cause significant pollution or degradation of the environment must take reasonable measures to prevent such pollution or degradation from occurring, continuing or recurring, or, in so far as such harm to the environment is authorised by law or cannot reasonably be avoided or stopped, to minimise and rectify such pollution or degradation of the environment.
>
> (2) Without limiting the generality of the duty in subsection (1), the persons on whom subsection (1) imposes an obligation to take reasonable measures, include an owner of land or premises, a person in control of land or premises or a person who has a right to use the land or premises on which or in which-
>
> (a) Any activity or process is or was performed or undertaken; or
>
> (b) Any other situation exits,
> which causes, has caused or is likely to cause significant pollution or degradation of the environment.
> .....
>
> (6) If a person required under this Act to undertake rehabilitation or other remedial work on the land of another, reasonably requires access to, use of or a limitation on use of that land in order to effect rehabilitation or remedial work, but is unable to acquire it on reasonable terms, the Minister may-
>
> (a) expropriate the necessary rights in respect of that land for the benefit of the person undertaking the rehabilitation or remedial work, who will then be vested with the expropriated rights; and
>
> (b) recover from the person for whose benefit the expropriation was effected all costs incurred.

[16] S 2(4) of NEMA lays down certain principles. Those are, among others, that pollution and degradation of the environment are to be avoided, or, where they cannot be altogether avoided, they should be minimised and remedied. Furthermore, negative impacts on the environment and on people's environmental rights should be anticipated and prevented, and where they cannot be altogether prevented, be minimised and remedied.

[17] In terms of s 2(1) of NEMA, those principles are also to serve as a general framework within which environmental management and implementation plans must be formulated. When taking any decision in terms of any statutory provision concerning the protection of the environment, any organ of State is enjoined to use the provisions of NEMA as guidelines for the exercise of any function in that regard. S 2(1)(e) provides that the principles are furthermore to guide the interpretation, administration and implementation of NEMA, and any other law concerned with the protection or management of the environment. It admits of no debate that the National Water Act is a law envisaged in s 2(1)(e) of NEMA.

[18] The NEMA principles received the imprimatur of the Constitutional Court in *Fuel Retailers Association of Southern Africa v Director-General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province, and Others.*[6]

[19] With the above legislative and jurisprudential framework in mind, I turn to consider the primary legal question: whether a directive issued under s 19(3) continues in force against a person who is no longer the landholder of the affected land.

Analysis of S 19 of the NWA

[20] That should start with a brief analysis of s 19 of the NWA. I have already alluded to the common cause understanding that the directive envisaged in s 19(3), can only be issued to the landholders, that is, only those who have current connection to the land. S 19(4) to (8) come into play if a landholder to whom a directive has been

[6] 2007 (6) SA 4 (CC) at para 67.

issued, fails to comply with it. The Minister may then 'take the measures (she) considers necessary to remedy the situation' and recover the costs of doing so from a range of persons.

[21] Those persons are not limited to the landholder who was obliged to take preventive measures in terms of s 19 (1) and to whom the Minister issued a directive in terms of s 19 (3), but extends to former landholders, persons who had the right to use the land at the time of actual or potential pollution, and any person who had negligently failed to prevent potential or actual pollution. There is therefore a clear contrast between the classes of persons in s 19(1) and (5), and the remedies available to the Minister in each case.

[22] When one considers s 19 (1) and (2) and their interrelation with s 28 of NEMA, it becomes clear that they are couched in strikingly similar terms. Both focus on preventive measures, and identify the persons on whom an obligation rests to take reasonable measures to prevent pollution as the owners, or persons in control of the land or premises, or persons who have the right to use the land.

The applicant's argument

[23] The applicant argues for a restrictive interpretation of s 19(3), and that in this particular instance, the directive became invalid by operation of law when the applicant's connection with the affected land came to an end. Counsel for the applicant, Mr. *Oosthuizen* advanced several contentions for this proposition. I hope not to do an injustice to counsel's well-constructed submissions (written and oral) by summarising the applicant's contentions as follows:

(a) the directive is not sourced in law, as it imposes liability in perpetuity;

(b) the directive breaches the principle of *cessante ratione legis cessat ipsa lex*;

(c) the restrictive interpretation is consistent with the NEMA principles;

(d) the directive is unreasonable to the extent it remains in force when the person against whom it was issued no longer has connection to the land or derive any benefit from the such land;

(e) the restrictive interpretation ensures that the severe penalties prescribed for non-compliance with a directive are limited to persons with current connection with the affected land;

(f) the word 'fails' in s 19(3) envisages that a person who is no longer a member of the circumscribed class can no longer be said to have failed to comply with a directive;

(g) the subsection does not envisage obligations to be imposed in perpertuity.

[24] I now consider the applicant's contentions, in turn.

The directive is not sourced in law, as it imposes liability in perpetuity.

[25] The argument here was that the directive imposes liability irrespective of the applicant's link to the affected land, burdening it with responsibility of taking measures to protect the environment and prevent poliution regardless of the extent of its causal contribution and/or the costs and benefits of such measures for it. It therefore, so was the argument, constituted too extreme an interference with the applicant's property to be constitutionally acceptable. To that extent, it is unreasonable and constitutionally impermissible as there is no causal link between conduct and consequence.

[26] A short answer to this submission is this. Among the reasons for the issuance of the directive, is the failure by some mining houses to fully comply with the previous directives. They failed to submit, or inadequately submitted, information necessary to determine and calculate the joint and several responsibility and liability of each individual mining house for contribution towards the costs incurred to remedy pollution caused by these mining houses. The mining houses had also failed to share the costs necessary for taking measures to prevent pollution.

[27] It is to be borne in mind that the directive was issued pending the implementation of an agreement and joint proposal towards long-term sustainable management of water arising from mining activities in the Kosh area. The mining houses, including the applicant, failed to reach such an agreement. Therefore it does not assist the applicant to decry the indefinite nature of the directive. The perpetuity referred to by the applicant remains only to the extent that the applicant and other mining houses fail to reach and implement the envisaged agreement.

The principle of *cessante ratione legis cessat ipsa lex*.

[28] The applicant contended that the legal basis, and rationale, on which the directive was issued, namely the current connection to the affected land, had fallen away when the applicant ceased to be a landholder of the affected land. Consequently, so was the argument, the directive should follow suit. This submission ignores the plain provisions of s 19(3), in terms of which the Minister may direct a landholder who fails to take the measures required by s 19(1) to:

'(a) commence taking specific measures before a given date;

(b) diligently continue with those measures; and

(c) complete them before a given date.'

[29] From these provisions, and the broader context, it is clear that the rationale is the preservation of the environment. The Minister is empowered to direct a landholder to take preventative measures for as long as it takes to address the risk of pollution. As a result, the rationale of the section, and of the directive, does not fall away when the landholder, who had been validly directed to take certain measures, severs ties with the affected land. The principle clearly does not find application here.

The NEMA principles

[30] Mr. *Oosthuizen* contended that the NEMA principles do not authorize the use of any means to ensure the protection of the environment. He argued that there are indications of constraints in those principles, tempering the means to be used and thus, upon the public power to be exercised towards achieving that end. These constraints, he argued, echoed the constitutional imperatives that the means or measures to ensure environmental protection must not go beyond the power conferred by the law, and that they must not be unreasonable under the circumstances. Counsel proffered the concept of responsibility laid down in NEMA as one of the factors which he submitted, were indications of constraints referred to above.

[31] In this regard, it was argued that in the context of the present case, the concept required an active intervention to do something, as opposed to a passive one. Therefore, so was the argument, only those in a position of lawful control *vis-a-vis*

the potential pollution or existing state of affairs, that is, who are able to take lawful steps to prevent it or lawfully intervene, may be said to be responsible for preventing and/or remedying its effects. Without such control or power of intervention, so it was argued, it would not be possible for the person concerned to take steps to avoid harm to the environment. It was further argued that the restrictive interpretation (which requires current connection between the landholder and the affected land) is consistent with the principles of responsibility enunciated in NEMA: only those persons who are in a position to lawfully control (and hence prevent) harm or potential harm to the environment are to be burdened with this legal duty or care and, once they are no longer in the required relationship with the affected land, that legal duty falls away.

[32] This argument overlooks the fact that where the directive was issued while a person was in control to take the preventative measures, his unfulfilled obligations do not become discharged or nullified once he ceases to be in control. If he severs ties with the land, fully knowing that his validly imposed obligations remained unfulfilled, he can hardly complain if it is insisted that he should comply with those before he is discharged from them. In this regard, s 28(6) of NEMA, which is concerned with rehabilitative and remedial work on another's land, comes into play, to the extent he has to access another person's land.

[33] Mr *Oosthuizen* also argued that the requirement of responsibility gives rise to a further constraint in that such responsibility is limited in time because it is directly linked, as far as the duration thereof is concerned, to the life cycle of the particular conduct embarked upon. The restrictive interpretation limits the duration for which a

directive may be issued, as s 19(3) specifically provides that the directive will require certain action to be taken before a given date and diligently continued to be completed by a given date. This in itself, so was the argument, was an indication that the legislature intended these directives to have a finite operation with some end in sight. Therefore s 19(3) does not provide for obligations to be imposed in perpetuity. By limiting the class of persons against whom the directive may be validly issued to those listed in s 19(1), the finite nature of the directive power is reinforced.

[34] This argument is clearly based only on a consideration of (a) and (c) of s 19(3), ignoring (b), from which the Minister' power to issue an indefinite directive, is implicit. The applicant's attack is not directed at the reasonableness or otherwise of the Minister's decision or that she failed to apply her mind. It is also not the applicant's the argument that s 19 is unconstitutional.

The directive is unreasonable

[35] In this regard, Mr *Oosthuizen* submitted that it is unreasonable for a directive to continue in force where there is no longer a current connection between the person against who the directive is issued and the affected land: that person is no longer under a legal duty of care in this regard; that person no longer derives any benefit from the affected land but others do at his expense; that person's contribution to the pollution or potential, both causally and morally as far as his blame is concerned, has not yet been quantified or determined; that person no longer has any control over the affected land so that he cannot be regarded as someone "responsible" to

take preventative measures; and yet he remains exposed to criminal sanctions as well as a continuing and unjustified infringement of his fundamental right to property.

[36] When considering the above argument the following should be borne in mind: the directive in question was issued on 1 November 2005, during which period the applicant was the landholder of the affected land as envisaged in s 19(1) of the NWA. The applicant's mining activities polluted and contributed to the pollution of the underground water in the Kosh area. The applicant derived financial benefit from its pollution activities. Without fully complying with the directive, and while the obligations in terms of that directive remained unfulfilled, the applicant disposed of its entire issued share capital to Pamodzi in August 2007. It is therefore not correct that the applicant is obliged to take responsibility for others' contribution to the pollution.

[37] The directive required of the applicant to take measures, among others, for pollution which occurred while the applicant was the landholder. The nature and extent of that duty is clearly defined in the directive. There is therefore a clear causal and moral link between the directive and the applicant's pollution activities. Furthermore, I find it significant that it was only shortly after Pamodzi was placed in provisional liquidation (March 2009) that the applicant first intimated to the Department (May 2009) that the directive was no longer valid against it.

A restrictive interpretation follows from the ordinary and grammatical meaning of the word "fails" as used in section 19(3) of the NWA.

[38] Counsel submitted that the directive power is premised on a failure to comply with the legal duty imposed by subsection (1) and, once a person is no longer a member of the circumscribed class of persons and thus does no longer have that legal duty, he can no longer be said to have failed or be failing to comply therewith. Furthermore, it is argued that this interpretation limits the scope of the persons against whom a section 19(3) directive may be issued. As such, it ensures that the severe penalties which may be imposed for non-compliance with a directive are limited to persons who have a current connection with the land in question.

[39] I cannot agree with any of these propositions. Starting with the first one, if a member of the class of persons had, while still a landholder, fails to comply with the duty, his failure does not become erased by him merely 'walking away' from the affected land without fulfilling the outstanding obligations. The applicant bases its interpretation on the fact that the Minister may only issue a directive to someone who "fails" to take the preventive measures required by s 19 (1), that is, to someone who has "a current connection with the land in question". However, this is relevant only with regard to the Minister's only limited power in terms of s 19(3) – she can only issue a directive to a landholder who is obliged to take preventive measures under s 19 (1) but fails to do so. This is common cause. The severance of ties with the affected land does not affect the obligations validly imposed when the landholder still belonged to the class of persons obliged to take measures. As a result, such obligations remain until fulfilled.

[40] With regard to the penalties, all I can say is that the threat of severe criminal penalties should hold no terrors for a landholder who complies with the obligations imposed validly, as is the case here. The penalties only kick in once there is failure to comply with a validly issued directive. The penalties are therefore aimed at those who fail to comply with the directive and those former landholders who seek to circumvent the directive by subsequently severing ties with the affected land. The only way to avoid those penalties is compliance with the directive.

[41] Finally, it was argued on behalf of the applicant that the contrast between classes of persons (which I have pointed out in paragraph [20] above) indicates that the legislature's solution to imposing liability on former owners lies not in s 19 (3) but in recovery of costs, should the Minister elect to take the measures referred to in s 19(4). That argument would be correct only with reference to a directive issued after a former owner had terminated connection with the land. In those circumstances, as stated above, the Minister's power is confined to the recovery of costs. But we have in the present case, a situation where the directive was validly issued to the applicant as the landholder.

[42] There is no limitation in s 19 that such a directive may only bind the owner, occupier or user of affected land to take measures for as long as such person remains such. Put differently, there is nothing to suggest that once the owner, occupier or user of land ceases to be such, the unfulfilled obligations imposed in terms of s 19(3) directive lapses. Had the directive been issued subsequent to the sale of shares agreement, it would be a different situation altogether, as then the Minister's remedy would be limited to the recovery of costs from the applicant in terms of s 19(5) after taking the measures envisaged in s 19(4).

[43] The applicant, by the construction it places on s 19(3), in essence, seeks to 'read in' by implication, words to the following effect, to the subsection:

> 'Once a person ceases to be an owner of land, a person in control of land or a person who occupies the land referred to in subsection (1) such a person shall no longer be obliged to take the measures referred to in subsection (2)'

[44] Mr. *Trengrove, counsel* for the fifth and sixth respondents, pointed out the proper approach if words were to be read into a statute by implication. He did so with reference to *Rennie NO v Gordon and Another NNO*[7]; *Bernstein v Bernstein*[8]; *NDPP v Mohamed*[9]; *Geuking v President of the RSA*[10] and *Masetlha v President of the RSA*[11]. That approach is: words cannot be read into a statute by implication unless the implication is a necessary one in the sense that, without it, effect cannot be given to the statute as it stands. I now consider, in turn, the applicant's submissions.

[45] Mr. *Trengrove* further submitted that the interpretation of s 19 (3) contended for on behalf of the applicant, would undermine its effectiveness, as a person who is obliged to take measures to prevent or minimise the pollution caused by the hazard he created, can simply circumvent his obligations and the Minister's directive by vacating the land and so escape the Minister's directive, and thereby defeat the purpose of s 19 (3). I agree.

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[7] 1988 (1) SA 1 (A) at 22E-F

[8] 1996 (2) SA 751 (CC) para 105

[9] 2003 (4) SA 1 (CC) para 48

[10] 2003 (3) SA 34 (CC) para 20

[11] 2008 (1) SA 566 (CC) para 192

[46] S 1(3) of the NWA provides that when interpreting a provision of the Act, any reasonable interpretation which is consistent with the purpose of the Act as stated in section 2, must be preferred over any alternative interpretation which is inconsistent with that purpose In my view, the restrictive interpretation contended for on behalf of the applicant would not be consistent with the stated purpose of the NWA. Such an interpretation would not only defeat that purpose, but would be at variance with the NEMA principles, the Constitutional and environmental imperatives, and render s 19(3) ineffective. It would clearly lead to a glaring absurdity in that a landholder who caused pollution through an activity that was performed or undertaken by him, can escape his obligations in terms of the directive by simply disposing of the land or by disposing of its interest or control or occupation of the land. That could not have been the intention of the legislature.

[47] In the final analysis, it should therefore be clear that the 'current connection' contended for on behalf of the applicant should refer to the period at the time when the directive was issued, and not subsequent thereto. It therefore follows that the 'reading in' of an implied limitation into s 19(3) is neither necessary nor warranted by the purpose of the NWA.

[48] I am therefore satisfied, and agree with the Department's contention that until the applicant fully complies with the directive, the directive remains valid. It was not issued subsequent to the sale of shares agreement that resulted in the applicant severing ties with the affected land, but was an existing obligation which remained unfulfilled at the time the applicant disposed of its interest in the mine to Pamodzi. The applicant does not contend that it has complied with the directive. The disposal of interest by the applicant could never bring an end to unfulfilled obligations

imposed in terms of the directive. As such, there was no duty or responsibility on the Department to withdraw the directive until such time there was proper compliance with the directive. The directive did not, as a result, breach the legality principle.

[49] That brings me to a consideration of the matter purely on the basis of PAJA. In this regard the applicant seeks to review and set aside the directive on the basis that it was not validly issued as there was no delegation of powers by the Minister to the first respondent to issue the directive. In paragraph [3] I pointed out that in the Kosh area there was no management catchment agency. The powers in s 19(3) therefore vested in the Minister. In terms of s 63 of the NWA, the Minister may delegate a power and duty vested in her to, among others, an official of the Deparment by name or the holder of an office in the Department. On 1 November 2005 there was no catchment management agency for the Kosh area. The directive was issued by the Regional Director, which presupposes that there must have been a delegation to him by the Minister of the powers under s 19(3).

[50] In its answering affidavit, the Department has attached what purports to be the Minister's delegation. It is undated and unsigned. It is on this basis that the applicant attacks the purported delegation as being of no force and effect. It is submitted that the Regional Director issued the directive without any lawful authority to do so. Assuming the applicant's contentions to be correct, the directive falls to be reviewed and set aside in terms of s 6(2)(a)(i) of PAJA.

[51] S 7 of PAJA requires the application to be brought without unreasonable delay, and in any event, within 180 days and after having exhausted internal remedies. In this regard the fifth and sixth respondents argued that the application is out of time and internal remedies have not been exhausted. I now consider the jurisdictional factors of s 7 of PAJA.

Delay

[52] The applicant submitted that a distinction be made between the decision to issue the directive on 1 November 2005 and the decision refusing to withdraw the directive on 21 September 2009. From that premise it was argued that the 1 November 2005 directive became invalid on 6 January 2009 when the affected land was transferred to Pamodzi. The application was launched a few months later, well within the 180 day period. Therefore, it was argued, there was no need for condonation. I do not agree. With regard to the issuance of the directive, the operative and determinative date is 1 November 2005. The application was made approximately 4 years after the directive was issued, and the application is clearly out of time.

[53] The applicant sought to overcome this difficulty on the basis of absence of prejudice on the part of any of the respondents. In my view, absence of prejudice is but one of the considerations, together with the reasons for the delay, to be taken into account in deciding whether or not to condone the delay. In the present case, the delay is of approximately 4 years after the directive was issued.

[54] The closest the applicant comes to explaining the reasons for the delay is this: initially it received legal advice that it may not need to challenge to challenge the directive because it could attack it collaterally if it were ever compelled to comply with it. This is an unsatisfactory explanation, and in fact flies in the face of the applicant's apparent attitude (of acceptance of the validity of the directive until January 2009). I do not consider the absence of prejudice on its own to be a sufficient basis, and decisive, in granting condonation for the delay. The delay is inordinate. There is no proper explanation for that. I am accordingly not inclined to exercise my discretion in the applicant's favour. The interests of justice do not permit of that.

Internal remedies

[55] If this conclusion is wrong, the applicant has in any event, failed to exhaust internal remedies. S 7 of PAJA requires an applicant for review first to exhaust his or her internal remedies. S 7(2) provides that 'no court or tribunal shall review an administrative action in terms of this Act unless any internal remedy provided for in any other law has first been exhausted'. In terms of s 148(1)(a) of the NWA the applicant was entitled, within 30 days of the issue of the directive, to appeal against the directive.

[56] The fifth and sixth respondents took issue with the fact that the applicant has not exhausted this internal remedy before launching this application. The applicant contended that an administrative appeal contemplated in the section does not cover situations like the present one in which the directive becomes invalid as a result of a change of circumstances. If this argument is correct, then at best for the applicant, the appeal became available to it on 6 January 2009. It did not exercise that.

[57] Only in 'exceptional circumstances' and on application, may an exemption be granted from exhausting any internal remedy, 'if the court deems it in the interest of justice'. What 'exceptional circumstances' are, would obviously differ from case to case. In *Nichol v The Registrar of Pensions Fund*[12] it was held that 'exceptional circumstances' must be those that are out of the ordinary and that render it inappropriate for the court to require the applicant first to exhaust his or her internal remedies. The circumstances must be such as to warrant the immediate intervention of the courts rather than resort to the applicable internal remedy. I do not find any exceptional circumstances in the present case to justify exempting the applicant from the requirement to exhaust internal remedies. I also do not find that this is a case in which the immediate attention of the courts is required. I therefore find that no proper case has been made for condonation of the late launching of the review application.

[58] To sum up. First, I am satisfied that the directive issued on 1 November 2005 did not breach the legality principle, and to that extent, was not invalid. Second, the plain language of s 19(3) of the NWA does not permit of a restrictive interpretation. Third, the applicant has not made out a case for condonation regarding its late launching of the review application. Fourth, it has similarly failed to establish exceptional circumstances for it to be exempted from the requirement to exhaust internal remedies before approaching this court. The application therefore falls to fail.

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[12] 2008 (1) SA 383 (SCA) para 16

[59] Finally, the issue of costs. This is a matter which is within the discretion of the court, which discretion must be exercised judiciously having regard to all the circumstances. It is so that the application is primarily about the applicant's own commercial interests. However, the applicant raised constitutional issues of importance aimed at vindicating a constitutional principle of legality. Its challenge cannot be described as frivolous or in any way inappropriate. The proper approach to adopt, in the circumstances, is that established in *Affordable Medicines Trust and Others v Minister of Health and Others*[13] and *Biowatch Trust v Registrar, Genetic Resources and Others*[14]. I would therefore not order costs in favour of any of the respondents.

[60] In the result the application is dismissed. There will be no order as to costs.

TM MAKGOKA
JUDGE OF THE HIGH COURT

[13] 2006 (3) SA 247 (CC) para 138.

[14] 2009 (6) SA 232 (CC) paras 23 and 24.

DATE HEARD	**:24 OCTOBER 2011**
JUDGMENT DELIVERED	**:29 JUNE 2012**
FOR THE APPLICANT	**:ADV MM OOSTHUIZEN SC (with ADV K HOFMEYER)**
INSTRUCTED BY	**:*CLIFFE DEKKER HOFMEYR*, CAPE TOWN, *FRIEDLAND HART SOLOMON & NICOLSON*, PRETORIA**
FOR THE FIRST, SECOND & THIRD RESPONDENTS	**:ADV B ROUX SC (with ADV TAN MAKHUBELE)**
INSTRUCTED BY	**:*STATE ATTORNEY*, PRETORIA**
FOR THE FIFTH AND SIXTH RESPONDENTS	**:ADV W TRENGROVE SC (with ADV T DALRYMPLE)**
INSTRUCTED BY	**:*EVERSHEDS*, SANDTON, *JACOBSON & LEVY INC*, PRETORIA**

NO APPEARANCES FOR THE 4TH & 7TH RESPONDENTS