THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

In the matter between Case No:18701/16

MINERAL SANDS RESOURCES (PTY) LTD **APPLICANT**

and

MAGISTRATE FOR THE DISTRICT OF VREDENDAL, Mr CS KROUTZ N.O.	**1st RESPONDENT**
MINISTER OF ENVIRONMENTAL AFFAIRS	**2nd RESPONDENT**
MINISTER OF MINERAL RESOURCES	**3rd RESPONDENT**
MINISTER OF WATER AND SANITATION	**4th RESPONDENT**
MINISTER OF ENVIRONMENTAL AFFAIRS & DEVELOPMENT PLANNING, WESTERN CAPE GOVERNMENT	**5th RESPONDENT**
DIRECTOR-GENERAL OF ENVIRONMENTAL AFFAIRS	**6th RESPONDENT**
HEAD OF THE DEPARTMENT OF ENVIRONMENTAL AFFAIRS & DEVELOPMENT PLANNING, WESTERN CAPE GOVERNMENT	**7th RESPONDENT**

Coram: ROGERS J

Heard: **20-23 FEBRUARY 2017**

Delivered: 20 MARCH 2017

JUDGMENT

ROGERS J:

Introduction

[1] This case concerns the validity of a search warrant issued by the first respondent on 26 September 2016 in which he authorised a search of the applicant's Tormin sand mine near Lutzville. Among other issues, the application raises questions (i) about the interpretation of statutory provisions giving effect to the government's One Environmental System agreement, an arrangement intended to establish a single environmental system for assessing the environmental aspects of activities, including mining activities, and (ii) about the powers of the various kinds of inspectors appointed to monitor and enforce compliance with environmental legislation. Despite some uncertainty on this, the legislation giving effect to the One Environmental System can for present purposes be taken to have come into force on 8 December 2014.

[2] The applicant ('MSR') was represented by Mr Hodes SC leading Mr de Waal.

[3] The application is opposed by the second, fifth, sixth and seventh respondents. I shall refer to them collectively as the respondents. They were represented by Mr Paschke leading Mr Sidaki and Ms Bleazard. The other respondents abide the court's decision.

[4] I shall refer to the individual respondents as follows:

- the first respondent (the Magistrate for the District of Vredendal) – the Magistrate;

- the second respondent (the national Minister of Environmental Affairs) and the department of which he is the political head – the Environment Minister and the DEA respectively (the sixth respondent is the Director-General of the DEA);
- the third respondent (the national Minister of Mineral Resources) and the department of which he is the political head – the Mining Minister and the DMR respectively;
- the fourth respondent (the national Minister of Water and Sanitation) and the department of which he is the political head – the Water Minister and the DWS respectively;
- the fifth respondent (the provincial Minister of Environmental Affairs & Development Planning, Western Cape Government) and the department of which he is the political head – the MEC and the DPWC respectively (the seventh respondent is the Head of the DPWC).

[5] The main legislative instruments relevant to this application are:

- the National Environmental Management Act 107 of 1998 ('NEMA');
- the Environmental Impact Assessment Regulations promulgated in terms of NEMA ('the EIA Regulations');
- various listing notices promulgated in terms of s 24(2) and s 24D of NEMA identifying activities requiring environmental authorisation and identifying the competent authority to grant the authorisation ('the Listing Notices');
- the National Environmental Management: Integrated Coastal Management Act 24 2008 ('the Coastal Act');
- the Control of Use of Vehicles in the Coastal Area Regulations of 27 June 2014 ('the Coastal Regulations');
- the National Water Act 36 of 1998 ('the Water Act');
- the Mineral and Petroleum Resources Development Act 28 of 2002 ('the Mining Act');
- the regulations promulgated under the Mining Act ('the Mining Regulations').

- the Criminal Procedure Act 51 of 1977 ('the CPA'), particularly s 21 thereof, being the provision in terms of which the Magistrate issued the warrant.

[6] It is convenient to discuss the main features of the legislation before setting out the facts. I confine myself to those aspects which have some bearing on the issues argued before me.

NEMA prior to 8 December 2014

[7] In terms of NEMA a person needs an environmental authorisation as contemplated in s 24 if the person intends to commence an activity identified in a Listing Notice. The Listing Notices are promulgated by the Environment Minister. In practice the Environment Minister promulgates four Listing Notices, the distinction being the rigour of the processes for assessing the potential impacts of the activity. The processes in question are contained in the EIA Regulations.

[8] The Listing Notices identify the competent authority for granting the environmental authorisation. Prior to 8 December 2014 the competent authority for granting environmental authorisations in the Western Cape was the DPWC unless the activity was of a kind described in s 24C(2), in which case the competent authority was the Environment Minister. Mining as such was not a listed activity. However a company intending to embark on mining would typically have had to perform activities which were listed activities (eg establishing infrastructure for the bulk transportation of water; facilities for the storage of fuel; clearing indigenous vegetation covering more than 1 ha etc) and would thus have needed environmental authorisation for those activities in terms of s 24 of NEMA.

[9] In terms of s 24N of NEMA the competent authority can require an applicant to submit an environmental management programme ('EMP' or 'NEMA EMP') as a precondition for the consideration of an application for an environmental authorisation. The main function of an EMP is to set out the proposed management, mitigation, protection and remedial measures that will be undertaken to address the environmental impacts of the listed activities.

[10] In terms of the EIA Regulations an applicant with an approved environmental authorisation and EMP may apply to have them amended.

[11] Section 24G of NEMA sets out the consequences of commencing a listed activity without environmental authorisation. A person who has done so may apply to the competent authority for an environmental authorisation. On receipt of the application the competent authority may direct the applicant immediately to cease the activity pending a decision. The applicant must pay an administrative fine, not exceeding R5 million, as determined by the competent authority. If an environmental authorisation is issued, it takes effect only from the date of issue, ie it does not retrospectively legitimise the unlawful commencement of the activity. (Such conduct is a criminal offence – s 49A(1)(a).)

[12] Part 2 of Chapter 7 of NEMA deals with the enforcement of NEMA and of 'specific environmental management Acts' (hereafter 'specific Acts'), a term defined in s 1. Included in the definition are the Coastal Act and the Water Act. Prior to 8 December 2014, ss 31B, s 31BA and s 31C of NEMA empowered the Environment Minister, the Water Minister and the MEC to appoint environmental management inspectors. For convenience I shall refer to inspectors appointed by these three authorities as national inspectors, water inspectors and provincial inspectors respectively. Section 31D, headed 'Mandates', provided that, when so designating a person as an inspector, the competent authority could determine whether the inspector was designated for the enforcement of whole or part of NEMA and/or specific Acts.

[13] The functions of inspectors are set out in s 31G. They must monitor and enforce compliance with the laws for which they have been designated. They may investigate any act or omission in respect of which there is a reasonable suspicion that the act might constitute an offence or a breach of the law or a breach of a term or condition of a permit, authorisation or other instrument. Their general powers are contained in s 31H. They have the right to question persons, to require the production of documents, to take photographs, to take samples and so forth. Section 31H(5) states that an inspector must be regarded as a peace officer and may exercise all the powers assigned to a peace officer or non-commissioned police

officer in terms inter alia of Chapter 2 of the CPA in order to comply with his or her mandate. Section 21 of the CPA is part of Chapter 2.

The Mining Act prior to 8 December 2014

[14] Section 22 of the Mining Act deals with the lodging of applications for mining rights. In terms of s 23 the Mining Minister must grant a mining right if certain conditions are met. One of these is that the mining will not result in unacceptable pollution, ecological degradation or damage to the environment.

[15] Prior to 8 December 2014 s 23(5) of the Mining Act provided that a mining right came into effect on the date on which the applicant's environmental management programme ('EMP' or 'Mining EMP') was approved in terms of s 39(4). In that regard s 37 stated that the principles set out in s 2 of NEMA applied to all mining operations. Section 38 provided that the holder of a mining right had to consider, investigate, assess and communicate the impact of its mining on the environment as contemplated in s 24(7) of NEMA and had to manage all environmental impacts in accordance with its approved Mining EMP. Section 39(1) provided that every person who applied for a mining right in terms of s 22 had to conduct an EIA and submit an EMP within 180 days of the date of being so notified by the Regional Manager, these processes being prescribed in the Mining Regulations.

[16] Section 40 of the Mining Act provided that, when considering a Mining EMP, the Mining Minister had to consult with the DEA. Section 39(4)(b) stipulated that the Mining Minister could not approve a Mining EMP without considering the DEA's comments.

[17] Prior to 8 December 2014, therefore, the Mining Minister's decision to approve an applicant's Mining EMP and to grant the mining licence effectively constituted the environmental authorisation to conduct the mining activity. At the same time, the applicant would typically have needed to obtain from the MEC or Environment Minister a NEMA environmental authorisation preceded by the approval of a NEMA EMP.

[18] Section 39(6) stated that the Mining Minister could approve an amended EMP. Somewhat unnecessarily, s 102 provided that an EMP could not be amended without the written consent of the Mining Minister.

[19] Section 91 of the Mining Act empowers the Mining Minister to designate officers as persons authorised to carry out the functions set out in s 91(4) and s 92. Essentially these are powers of targeted and routine inspections respectively.

[20] Regulations 48-52 of the Mining Regulations prescribed how the environmental impacts of mining were to be assessed and the requirements for a Mining EMP. As in the case of activities identified in NEMA Listing Notice 2, the applicant was required to submit a scoping report for approval, followed by an EIA report. There are some differences between the NEMA procedure and the mining procedure. For example, the NEMA EIA Regulations require a public participation process both in relation to the scoping report and the EIA report whereas the Mining Regulations required a public participation process only in relation to the EIA report. There are other differences, the EIA Regulations generally being more detailed.

NEMA and Mining Act as from 8 December 2014

[21] NEMA was amended by Act 62 of 2008 and by Act 25 of 2014. The Mining Act was amended by Act 49 of 2008. The amendments of NEMA relating to mining, and the amendment of the Mining Act, seem to have been intended to come into operation on 8 December 2014 though a close reading of the convoluted legislation would suggest that the commencement date was 1 September 2014.[1] The amended

[1] **[A]** Pursuant to s 14(1) of Act 62 of 2008, that Act was proclaimed to come into operation on 1 May 2009. Section 14(2) provided, however, that, notwithstanding any such proclamation, the provisions relating to prospecting, mining, exploration and production and related activities would only come into operation on a date 18 months after the commencement of s 2 of Act 25 of 2008 or of Act 49 of 2008, whichever was the later. The later of these dates was 7 June 2013, being the commencement date of Act 49 of 2008. Subject to what I say next, the result would have been that the mining provisions of Act 62 of 2008 came into force on 8 December 2014. **[B]** However Act 25 of 2014 not only amended NEMA but also amended Act 62 of 2008, the mining provisions of which had not yet become operative. Act 25 of 2014 amended Act 62 of 2008 inter alia by deleting s 14(2) of the latter Act with effect from a date one day before the commencement of Act 25 of 2014. Since it was s 14(2) which was deferring the coming into force of the mining provisions of Act 62 of 2008, the effect of the deletion of s 14(2) seems to have been that the mining provisions of Act 62 of 2008 came into force one day before the date on which Act 25 of 2014 came into force. Since Act 25 of 2014 came into force on 2 September 2014, the mining provisions of Act 62 of 2008 came into force on 1 September

EIA Regulations and the new Listing Notices, which accommodated the inclusion of mining among the listed activities for purposes of NEMA, were promulgated on 4 December 2014 and came into effect on 8 December 2014, consistent with an understanding that the relevant provisions of NEMA and the Mining Act were to come into force on 8 December 2014. In a government press release of 6 December 2014 it was stated that the roll out of the One Environmental System would start on 8 December 2014. The parties were willing to argue the case on the basis that 8 December 2014 was the commencement date and, since nothing turns on this, I shall regard it as such.

[22] The main features of NEMA as amended are, for present purposes, the following. The Environment Minister remains responsible for identifying listed activities. However in terms of s 24C(2A) the Mining Minister must be identified as the competent authority for granting environmental authorisations where the listed activity directly relates to mining. (This is reflected in the new Listing Notices.) Section 24N makes provision for the Mining Minister to require an applicant for an environmental authorisation to submit an EMP. An appeal against a decision made by the Mining Minister or his delegee (cf s 42B) lies to the Environment Minister (s 43(1A)).

[23] A new s 31BB states that the Mining Minister may designate any DMR staff member as an environmental mineral resource inspector. (I shall refer to such persons as 'mining inspectors'.) In the section containing the 'mandates' of inspectors, the following provision has been added as s 31D(2A):

'The [Mining Minister] may designate a person as an environmental mineral resources inspector for the compliance monitoring and enforcement of the provisions of this Act or of a specific environmental management Act in respect of which powers are conferred on him or her.'

2014. **[C]** Although Act 49 of 2008 (which amended the Mining Act) came into operation on 7 June 2013, s 94(2) provided that, notwithstanding any such proclamation, certain sections were only to come into force on the date contemplated in s 14(2) of Act 62 of 2008. The intention clearly was that the mining provisions inserted into NEMA by Act 62 of 2008, and the corresponding amendments to the Mining Act, should come into force on the same date. The authorities seem to have believed that the date in question was 8 December 2014. It appears though, that the unintended consequence of the deletion of s 14(2) of Act 62 of 2008 by Act 25 of 2014 was that the provisions in question came into force on 1 September 2014 rather than 8 December 2014.

[24] Section 31D(3) provides that a person designated as an environmental management inspector or environmental mineral resource inspector may exercise any of the powers given to environmental management inspectors in NEMA that are necessary for the inspector's mandate and that are specified by the relevant Minister or MEC by notice in writing to the inspector. A mining inspector, like a national, water or provincial inspector, thus ordinarily has the functions and general powers set out in ss 31G and 31H, including the power in s 31H(5) to be treated as a peace officer or police official for purposes of Chapter 2 of the CPA.

[25] A contentious issue in the present case is whether national, water, provincial and mining inspectors have concurrent jurisdiction to monitor compliance with, and enforce, the provisions of NEMA insofar as they relate to mining or whether only mining inspectors may do so. With this issue in mind, it is necessary to set out in full the provisions of ss 31D(4)-(9) which came into force on 8 December 2014 (I shall substitute for the provisions in NEMA the terminology of convenience used in this judgment):

'(4) Despite the provisions in subsections (2A) and (3), the [Environment Minister] may, with the concurrence of the [Mining Minister], if the [mining inspectors] are unable or not adequately able to fulfil the compliance monitoring and enforcement functions, designate environmental management inspectors to implement these functions in terms of this Act or a specific environmental management Act in respect of which powers have been conferred on the [Mining Minister].

(5) In the event that a complainant alleges that a specific compliance monitoring and enforcement function relating to prospecting, exploration, mining and production has not been implemented or has been inadequately implemented, the complainant must submit, in writing, information substantiating such allegations to the [Mining Minister].

(6) In the event that the complainant is not satisfied with the response from the [Mining Minister], the complainant may submit, in writing, such information to the [Environment Minister] with substantiating documentation, including details of the engagement with the [Mining Minister].

(7) On receipt of such information referred to in subsection (6), the [Environment Minister] must consult with the [Mining Minister] on his or her response to the complainant.

(8) Subsequent to subsection (7), the [Environment Minister] may, in concurrence with the [Mining Minister], within a reasonable period of time and where appropriate –

(a) assist or support the [Mining Minister] to fulfil his or her compliance monitoring and enforcement obligations under this Act; or

(b) direct the environmental management inspectors as contemplated in subsection (4) to undertake the compliance monitoring and enforcement functions.

(9) The [Environment Minister] must inform the complainant of steps taken in response to the complaint.'

[26] It is convenient, at this point, to refer to the explanatory memorandum which accompanied the bill which became Act 25 of 2014. Regarding the new ss 31BB and 31D(2C), the memorandum said the following:

'**Clause 11: Insertion of section 31BB**

The Director-General responsible for mineral resources will implement [NEMA] as far as it relates to listed or specified activity directly related to prospecting, exploration, mining or production. Therefore, it is also important for the [Mining Minister] to enforce those environmental authorisations issued by him or her. This amendment will empower the [Mining Minister] to designate [mining inspectors], who will be responsible for compliance monitoring and enforcement of environmental provisions under NEMA.

Clause 12: Amendment of section 31D

This amendment provides for the powers of the [mining inspectors]. The amendment also ensures that enforcement takes place when capacity challenges are experienced. In such instances, the [Environment Minister] may, with the concurrence of the [Mining Minister], if the [mining inspectors] are unable or not adequately able to fulfil the compliance monitoring and enforcement functions, designate environmental management inspectors to implement these functions.

The amendment also makes provision for the circumstances where a complainant alleges that a specific compliance monitoring and enforcement function relating to prospecting, exploration, mining and production has not been or has inadequately been implemented. The section sets out the procedure to follow in such an instance and, if all the avenues are exhausted as indicated in the section, the [Environment Minister] may either decide to assist and support the [Mining Minister] to fulfil the enforcement function or direct environmental management inspectors to fulfil the function.'

[27] With effect from 8 December 2014, ss 38-42 of the Mining Act were repealed. These were the provisions dealing inter alia with environmental impact assessments

and the approval of Mining EMPs as a pre-requisite for the granting of mining rights. The following somewhat Delphic provision has been inserted as s 38A under the heading 'Environmental authorisations':

'(1) The [Mining Minister] is the responsible authority for implementing environmental provisions in terms of [NEMA] as it relates to prospecting, mining, exploration, production or activities incidental thereto on a prospective, mining, exploration or production area.

(2) An environmental authorisation issued by the [Mining Minister] shall be a condition prior to the issuing of a permit or the granting of a right in terms of this Act.'

[28] Section 102 of the Mining Act has been amended. The new s 102(2) has not yet been brought into force. The new s 102(1) is a repeat of the old s 102, save that a reference has now been added to an environmental authorisation issued in terms of NEMA (ie issued by the Mining Minister).

Transitional provisions

[29] The transitional provisions applicable to the amendments of NEMA and the Mining Act present their own difficulties. Section 12 of Act 62 of 2008 as amended by Act 25 of 2014 contains the following relevant transitional provisions:

'(1) Anything done or deemed to have been done under a provision repealed or amended by this Act –

(a) remains valid to the extent that it is consistent with [NEMA] as amended by this Act until anything done under [NEMA] as amended by this Act overrides it; and

(b) subject to paragraph (a), is considered to be an action under the corresponding provision of [NEMA] as amended by this Act.

(2) An application for authorisation of an activity that is submitted in terms of Chapter 5 of [NEMA] and that is pending when this Act takes effect must, despite the amendment of [NEMA] by this Act, be dispensed with in terms of Chapter 5 of [NEMA] as if Chapter 5 had not been amended.

…

(4) An environmental management plan or programme approved in terms of the [Mining Act]; *[sic]* immediately before the date on which this Act came into operation must be regarded as having been approved in terms of [NEMA] as amended by this Act.

…

(7) An application for a right or permit in relation to prospecting, exploration, mining or production in terms of the [Mining Act] that is pending on the date referred to in section 14(2)(b) of [Act 62 of 2008], must be dispensed of *[sic]* in terms of that Act as if that Act had not been amended.'

[30] As mentioned previously, the date contemplated in s 12(4) may be 1 September 2014 or 8 December 2014 (my assumption being the latter). The effect of s 12(4) is that a Mining EMP approved prior to 8 December 2014 is to be regarded as an EMP approved in terms of s 24N of NEMA.

[31] The expression 'that Act' in s 12(7) is a reference to the Mining Act. The 'date referred to in section 14(2)(b)' of Act 62 of 2008 is, on a literal interpretation, the date on which Act 49 of 2008 came into force, namely 7 June 2013, but I agree with the respondents' submission that what was intended was a date 18 months after 7 June 2013, namely 8 December 2014.[2] There was some debate as to whether s 12(7) would include an application in terms of s 102 of the Mining Act to amend a Mining EMP. If s 12(7) applies to an application to amend a Mining EMP, the effect of s 12(7) would be that such an amendment application, pending as at 8 December 2014, would have to be finalised in terms of the Mining Act without reference to the fact that with effect from 8 December 2014 the provisions in the Mining Act dealing with Mining EMPs were deleted.

[32] A narrower interpretation would be that s 12(7) is concerned only with applications for mining rights and mining permits. If such an application is pending as at 8 December 2014, it must be finalised without reference to the amendments made to the Mining Act with effect from 8 December 2014. This would mean that the applicant would only need to satisfy the provisions in the unamended Mining Act dealing with environmental assessments and Mining EMPs; the applicant would not have to embark on a fresh environmental process in terms of NEMA as amended. As I explain later, this in my opinion is the preferable view.

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[2] See footnote 1 above.

[33] The 2014 EIA Regulations contain further transitional provisions. Regulation 53(1) states that an application submitted in terms of the previous (2010) EIA Regulations which is pending when the 2014 Regulations take effect (8 December 2014) must be 'dispensed with' in terms of the 2010 EIA Regulations as if they had not been repealed. Regulations 39 and 46 of the 2010 EIA Regulations regulated applications to amend environmental authorisations and NEMA EMPs respectively.

[34] Regulation 54(1) of the 2014 EIA Regulations states that an application submitted in terms of the Mining Regulations which is pending as at 8 December 2014 must be 'dispensed with' in terms of the Mining Regulations as if the latter regulations had not been repealed. Regulation 54(3) says that for this purpose 'application' includes an application for the amendment of a Mining EMP. Regulation 54(2) provides that an application submitted after 8 December 2014 for the amendment of a Mining EMP must be dealt with in terms of the new 2014 EIA Regulations.

[35] Regulation 54 is curious for several reasons. Firstly, it is surprising to find transitional provisions relating to the Mining Act and Mining Regulations in the EIA Regulations. It is not self-evident that the power to make this regulation is conferred on the Environment Minister by s 44 of NEMA. Second, the Mining Regulations did not then, and do not now, regulate applications to amend Mining EMPs. Third, the Mining Regulations have not been repealed.

[36] The new s 38B of the Mining Act, inserted by Act 49 of 2008, contains what may be regarded as further transitional provisions but it has not yet come into operation. Subsection (1) reads thus:

'(1) An environmental management plan or environmental management programme approved in terms of this Act before and at the time of the coming into effect of [NEMA], shall be deemed to have been approved and an environmental authorisation been issued in terms of [NEMA].

[37] This provision is nonsensical. NEMA came into effect on 21 January 1999. The Mining Act came into force on 1 May 2004. Accordingly it would be impossible for there to have been any EMPs approved in terms of the Mining Act as at 21

January 1999. The lawmaker may have intended to refer to NEMA as amended with effect from 8 December 2014. If so, the new s 38B(1) would be a repetition of s 12(4) of Act 62 of 2008.

The Coastal Act

[38] The Coastal Act is unaffected by the amendments made to NEMA and the Mining Act. The Coastal Act is one of the specific Acts contemplated in NEMA. Section 63 provides that where an environmental authorisation in terms of NEMA is required for 'coastal activities', the competent authority (which, as from 8 December 2014, would be the Mining Minister if the 'coastal activity' took the form of mining) must take into account all relevant factors, including those specified in s 63(1). The term 'coastal activities' means activities listed in terms of NEMA and which take place in the 'coastal zone' or outside the coastal zone but which have or are likely to have a direct impact on the coastal zone. (MSR's mining activities take place within the 'coastal zone' as defined in the Coastal Act.)

[39] Section 70(1)(e)(i) of the Coastal Act states that no person may, except on the authority of a dumping permit granted in terms of s 71, 'dump at sea any waste or other material'. In terms of s 71 the Environment Minister is the person authorised to issue a dumping permit. In terms of s 79(1)(e), contravention of s 70(1)(e) is a criminal offence.

[40] The expression 'dumping at sea' is defined in s 1, the potentially relevant part of which is para (a):

'(a) any deliberate disposal into the sea of any waste or material other than operational waste from a vessel, aircraft, platform or other man-made structure at sea'.

[41] It is common cause that the mining inspectors appointed by the Mining Minister in terms of s 31D(2A) of NEMA do not have powers to monitor compliance with, and enforce, the Coastal Act and that the Mining Minister has not purported to confer any such powers on them. It is also common cause that the national and provincial inspectors who feature in the present case have been designated by the Environment Minister and the MEC respectively to exercise monitoring and

enforcement functions in relation to NEMA and all specific Acts, including the Coastal Act.

Statutory recognition of the One Environmental System

[42] The One Environmental System is expressly recognised in s 50A of NEMA and in s 163A of the Water Act, the terms of which are similar. Section 50A of NEMA states that any proposed amendments to the provisions of NEMA or any other legislation that may have the effect of amending the provisions of the 'Agreement' must be subject to concurrence between the Environment Minister, the Water Minister and the Mining Minister.

[43] The 'Agreement' is defined as meaning

'… the Agreement reached between the [Environment Minister], the [Water Minister] and the [Mining Minister] titled *One Environmental System* for the country with respect to mining, which entails –

(a) that all environment related aspects would be regulated through one environmental system which is [NEMA] and that all environmental provisions would be repealed from the [Mining Act];

(b) that the [Environment Minister] sets the regulatory framework and norms and standards, and that the [Mining Minister] will implement the provisions of [NEMA] and the subordinate legislation as far as it relates to prospecting, exploration, mining or operations;

(c) that the [Mining Minister] will issue environmental authorisations in terms of [NEMA] for prospecting, exploration, mining or operations, and that the [Environment Minister] will be the appeal authority for these authorisations; and

(d) that the [Environment Minister], the [Mining Minister] and the [Water Minister] agree on fixed time-frames for the consideration and issuing of the authorisations in their respective legislation and agree to synchronise the time frames.'

[44] The One Environmental System is also dealt with at some length in the explanatory memorandum previously mentioned.

Factual background

[45] In 2007 MSR applied to the DMR for a mining right to mine heavy mineral sands (zircon, ilmenite, garnet, leucoxene and rutile) on a 12-km stretch of beach adjacent to the farm Geelwal Karoo in the Vredendal district. This required the preparation of a Mining EMP.

[46] Since the mining operation required MSR to perform certain activities listed in terms of NEMA (at that stage in the 2006 Listing Notices), MSR also made application to the DPWC for environmental authorisation (the DPWC being the competent authority for purposes of the implicated activities). This required the preparation of a NEMA EMP.

[47] On 27 November 2008 the DMR approved the Mining EMP and issued the mining right to MSR. On 9 June 2011 the DMR approved an amended Mining EMP. (At this stage mining had not yet begun.)

[48] On 25 July 2012 the DPWC granted the requested environmental authorisation to MSR and approved the NEMA EMP. The environmental authorisation related to various activities contained in the 2006 Listing Notices and to certain further activities contained in the 2010 Listing Notices. The conditions of the authorisation stated inter alia that MSR had to comply with any other statutory requirements that might be applicable to the undertaking of the listed activities.

[49] Construction of the mining facilities began in April 2013. Mining began in the second half of the year. The mine is known as the Tormin mine.

[50] The approved mining operation was in summary the following. Sand would be mined mainly between the low-water mark and the lesser of the high-water mark and a setback line of 10 m from the toe of the cliff (the 10 m buffer zone was to minimise the risk of cliff failure). Wet sand would be pumped from hydraulic excavators to trommels (to remove seaweed etc) and then to two mobile primary beach concentrators (‘PBCs’). The PBCs remove water and extraneous material. This waste would be returned to the mined-out area. The concentrate from the

PBCs would be transported by articulated dump trucks (‘ADTs’) from the beach to the site of the secondary concentrator plant (‘SCP’) located above the cliff. Waste (tailings in the form of sand) from the SCP would be returned to the beach by the ADTs and deposited with the waste from the PBCs for distribution in the mined-out area as uniformly as possible. Ocean tidal action was to be the major influence in reinstating the beach profile within a short period of time. Water from the SCP would be returned to the beach by a pipeline routed along the beach access roads used by the ADTs. The zircon/rutile-rich concentrate would be transported by truck to Saldanha Bay or Cape Town for export or sale in the local market.

[51] Mining strictly in accordance with this method did not last very long. By the end of the year MSR relocated the PBCs from the beach to the SCP site above the cliff. At some stage thereafter MSR introduced further changes. Instead of returning the tailings to the beach by ADT, MSR installed a pipeline for this purpose. MSR also installed two garnet stripping plants (GSPs) on the SCP site. With the SCP site becoming congested, MSR began to expand it by clearing a further area around the approved SCP site. A haul road was widened from 8 m to 12 m.

[52] The moving of the PBCs from the beach to the SCP site is one bone of contention. MSR claims that this change was effected because severe storm conditions in October 2013 made it impractical and unsafe to operate the PBCs on the beach. The opposing view is that MSR made the change to improve productivity and that the change resulted in increased water run-off from the SCP site which in turn caused the subsequent collapse of the cliff beneath the SCP.

[53] A DMR official conducted a site inspection in June 2014 and found that MSR was contravening the EMP by mining within the 10 m buffer area. Two provincial inspectors were assigned to investigate this complaint. At a meeting on 25 June 2014 MSR told the inspectors that it wanted to expand the footprint of the SCP from 2,8 ha to 5,8 ha and make additional access roads. MSR sought guidance as to what authorisation was needed. The inspectors told MSR that the expansion of the SCP would require an amendment to the NEMA environmental authorisation and that the construction of new roads was a listed activity which would trigger the need

for a further environmental authorisation. This was confirmed in a letter of 2 July 2014.

[54] On 16 July 2014 the provincial inspectors conducted an inspection to investigate DMR's complaint. They concluded that MSR had not mined in the buffer area. They did observe, however, that MSR had cleared about 250 m² of indigenous vegetation. They informed MSR that it was unlawful to clear more than 1 ha without an environmental authorisation. They were assured that the clearing activity had ceased and that the area would be naturally rehabilitated. (The DPWC's findings in this regard are reflected in letters dated 1 October 2014 and 23 October 2014.)

[55] On 23 July 2014 MSR applied to the DPWC for an amendment of its NEMA environmental authorisation and its NEMA EMP. The changes included the expansion of the SCP by 3 ha, the placement of the PBCs at the back of the SCP site and the piping of tailings to the beach. On 1 August 2014 the DPWC notified MSR that the amendment application required a public participation process.

[56] Also in July 2014, MSR applied to the DMR for an amendment of its Mining EMP. A public participation process ensued and the amendment application was finally ready for DMR's consideration on 2 December 2014.

[57] In the meanwhile, and on 23 October 2014, MSR's environmental consultant, GCS, met with one of the provincial inspectors, Ms Schippers, to discuss the pending application to amend the NEMA environmental authorisation and the NEMA EMP. GCS told Ms Schippers that MSR had already cleared an area of approximately 1,3 ha outside the approved SCP area. Ms Schippers' reaction was that the commencement of this clearing was unlawful and could thus not be considered as part of the application to amend the environmental authorisation and EMP; in respect of the unlawful activity, MSR would have to follow the procedure set out in s 24G of NEMA.

[58] The One Environmental System came into force on 8 December 2014. On that date MSR's applications for the amendment of its NEMA environmental authorisation, NEMA EMP and Mining EMP were pending. The effect of the

legislative changes was that, subject to any applicable transitional provisions (i) the Mining Minister became the competent authority to approve any NEMA environmental authorisation and NEMA EMP which MSR needed; and (ii) that no Mining EMP or amended Mining EMP was required.

[59] However s 12(2) of Act 62 of 2008 and regulation 53 of the 2014 EIA Regulations provided that the application to amend the environmental authorisation and NEMA EMP were to be dealt with as if NEMA and the 2010 EIA Regulations had not been amended. Accordingly the MEC remained the competent authority to deal with those two pending applications.

[60] In regard to MSR's pending application for the amendment of its Mining EMP, its disposition requires one to interpret s 12(7) of Act 62 of 2008 and the curious regulation 54 of the 2014 EIA Regulations. More of this later.

[61] MSR did not pursue its amendment application with the DPWC and that application lapsed after six months.[3] This was confirmed in a letter from the DPWC to MSR dated 21 May 2015.

[62] In regard to the pending application with the DMR for the amendment of the Mining EMP, MSR wrote to the DMR on 20 January 2015 complaining that one of its officials, Mr Briers, was insisting that MSR repeat most of the environmental impact assessments. MSR accused Mr Briers of bias and requested intervention by his superiors. This request seems to have succeeded. On 14 April 2015 the DMR approved the amended Mining EMP in terms of s 39(6) of the Mining Act. Para 20 of the approval stated that any activities listed in terms of the new NEMA regulations required approval from the competent authority before the activities could be commenced. (By April 2015 s 39 of the Mining Act had been repealed. Accordingly the DMR's reliance on s 39(6) presupposes that the section had continued force by virtue of a transitional regime.)

[3] This was in terms of regulation 67 of the 2010 EIA Regulations.

[63] MSR's attitude is, in short, that the approval of 14 April 2015 is the only approval it needed to conduct the activities set out in the amended Mining EMP. It contends that the amended Mining EMP is deemed to be an amended NEMA EMP. It disputes being under any obligation to seek an amendment of its existing NEMA environmental authorisation or any additional NEMA environmental authorisation.

[64] In the meanwhile, and in February 2015, the DEA and DPWC received via the Municipality a complaint document alleging that MSR had increased the size of the SCP site without authorisation, that uncontrolled water run-off had contributed to the failure of the cliff, that MSR was mining within the 10 m buffer area and within a conservation area. As a result of the complaint, the provincial inspectors conducted an inspection on 24 February 2015 (MSR did not object to the jurisdiction of the provincial inspectors). This revealed that MSR had widened the main access road by 4 m, that the SCP area had been expanded by about 3,8 ha and that mining was occurring within conservation areas demarcated in the NEMA environmental authorisation. The findings were recorded in a letter to MSR dated 7 April 2015. The DPWC required MSR to submit an audit report prepared by an external environmental auditor.

[65] In April 2015 the DPWC received further complaints to the effect that MSR had: (i) constructed a jetty-like structure in the sea; (ii) removed unauthorized material from a decommissioned mine in a nature reserve; (iii) expanded the SCP area; (iv) installed pipelines for transporting tailings to the beach outside the approved mining footprint; (v) mined within conservation areas; (vi) mined within the 10 m buffer zone. The DPWC communicated these complaints to the DMR in a letter dated 15 May 2015, evidently on the basis that the DMR was now the competent authority to deal with these matters.

[66] On 22 April 2015 Mr Dlulane, a national inspector with the DEA, wrote to MSR regarding the complaints received via the Municipality and notifying MSR that he would be conducting an inspection on 29 April 2015. The inspection was deferred because the relevant official from MSR was not available. MSR wanted to have a meeting before the inspection but Mr Dlulane insisted that the inspection take place first.

[67] On 20 May 2015 MSR wrote to Mr Dlulane responding to the complaints and expressing the view that MSR was being 'persecuted by a certain individual or a group of persons'. MSR said that DMR inspectors had visited the mine that same day (20 May) to investigate similar complaints. MSR expressed the view that as at 8 December 2014 the DMR became the competent authority within mining areas and that the Mining Minister was empowered by NEMA to appoint mining inspectors. MSR requested 'clarification in terms of your competent authority'.

[68] On 21 May 2015 the DMR wrote to MSR concerning the inspection of the previous day, expressing the view that the construction of the jetty and the expansion of the SCP area was within the environmental authorisation granted on 25 July 2012. The letter recorded that the DMR had become the competent authority as from 8 December 2014 and that in the DMR's view no further amendment was required to MSR's environmental authorisation and EMP.

[69] Mr Dlulane said that the national inspectors from the DEA would be coming for the inspection on 29 May 2015. MSR replied that it first needed a response to the letter of 20 May 2015. MSR wanted to 'understand the legislative authority for your investigative/compliance visit'. Mr Dlulane replied by stating that he was responsible for enforcing the Coastal Act and the Coastal Regulations. He listed various matters which fell within his remit, including 'illegal coastal discharges'. (This was the first occasion on which possible contraventions of the Coastal Act and the Coastal Regulations were mentioned.) MSR thanked Mr Dlulane for explaining the scope of his work but said that this was not the issue. The issue was that the area in question was a mining area. On MSR's understanding, as from 8 December 2014 all environmental related activities within a mining area fell within the jurisdiction of the DMR. What MSR was trying to ascertain was 'the legislative authority you have within the mining area, not your job description'.

[70] Mr Dlulane responded by sending MSR the Coastal Regulations and said he would be conducting his inspection to establish compliance therewith (ie the use of vehicles on the beach). He called on MSR to indicate as a matter of urgency whether MSR would permit him and his officials to gain access to the premises. In a reply dated 25 May 2015 MSR challenged the supposed contravention of the

Coastal Regulations and said that the use of vehicles was a listed activity authorised by MSR's environmental authorisation and EMP. After repeating that the DMR was now the competent authority and that NEMA authorised the Mining Minister to appoint mining inspectors, MSR requested Mr Dlulane to provide his prescribed identity card in terms of s 31F(2) of NEMA and concluded:

'Lastly, Mr Dlulane, the issue in dispute is your authority and your mandate and it is MSR's right to be provided with such answers before the intended inspection and such should not be construed as the refusal or any words to that effect.'

[71] In an email to MSR of 28 May 2015 Mr Dlulane said that mining inspectors were not authorised to enforce the Coastal Regulations. He said it had become apparent that the inspection of 29 May 2015 would not be possible and that he would be 'engaging in other means' to achieve his objective of inspecting the premises.

[72] From MSR's perspective, the matter rested there for about 16 months until, on 29 September 2016, a large contingent of officials arrived at its Tormin mine to execute a search warrant issued by the Magistrate the previous day in terms of s 21 of the CPA.

[73] The official who applied for the warrant was Ms Meissenheimer, a grade 2 national inspector. She attached to her affidavit a supporting affidavit by Mr Dlulane, a grade 1 national inspector. She also attached what she described as photographs of illegal activities from complainants who wanted to stay anonymous. This attachment was a document headed 'Further Transgressions' consisting of text and photographs ('the FT document'). Although the FT document purports to have been produced by a firm called PB Professional Services (for which contact details were given), no individual author or complainant was identified. After the FT document were a further 24 pages of images and related captions. Since the FT document did not refer to them, they do not appear to have formed part thereof. Ms Meissenheimer did not explain their provenance.

[74] As is well established, an applicant for a search warrant must establish, by evidence under oath (i) the existence of a reasonable suspicion that an offence has

been committed; (ii) the existence of reasonable grounds for believing that things connected with the offence may be found on the premises to be searched (*Minister of Safety and Security v Van der Merwe & Others* 2011 (2) SACR 301 (CC) para 39).

[75] Ms Meissenheimer sought to establish that there were reasonable grounds for believing that there were documents and other things at the Tormin mine which might afford evidence of the commission of the following reasonably suspected offences:

- a violation of s 49A(1)(e) of NEMA by unlawfully and intentionally or negligently causing significant degradation of the environment, namely the collapse of the cliff ('the failing cliff charge');
- a violation of s 79(1)(e) of the Coastal Act by dumping waste or other material at sea without a dumping permit in contravention of s 70, namely by disposal of tailings into the sea ('the dumping charge');
- three violations of s 49A(1)(a) of NEMA – commencing listed activities in contravention of s 24F(1) – by developing the jetty ('the jetty charge'), by clearing an area of more than 1 ha ('the increased footprint charge'), and by development of a road wider than 4 m ('the road charge').

[76] Ms Meissenheimer said in her affidavit that from the photographs received from the anonymous source it was clear that these five activities had taken place.

[77] In his affidavit Mr Dlulane said that at around the beginning of 2015 the DEA received a complaint from a member of the public regarding suspected illegal activities at the Tormin mine. He repeated verbatim a list of initial complaints set out in the first paragraph of the FT document. He then said that, because he was appointed to enforce the Coastal Act, it became his responsibility to lead the investigation into the complaints. In preparation for the investigation he had written to MSR's general manager informing him of his intention to conduct an inspection. He claimed that after several follow-up telephone calls he was 'denied access to the mining site' because MSR 'was questioning my authority and whether I am designated as an Environmental Management Inspector'. He alleged that, as an

inspector responsible for enforcement of the Coastal Act, he was authorised to investigate any reported incidents that may cause adverse effects to the coastal environment despite the location in which the incident occurred. He also alleged that MSR's refusal to allow him access raised suspicion that MSR might be engaging in illegal or unauthorized activities. It was thus 'imperative' that a search warrant be issued to the DEA for purposes of seizing any material or equipment used in the commission of a crime in terms of the Coastal Act.

[78] The warrant named Ms Meissenheimer and 14 other officials as persons who could assist in the execution of the warrant. These included national inspectors, provincial inspectors, mining inspectors, a town planner from the Municipality, two land surveyors from the Department of Land and Rural Development and five police officers.

[79] The contingent which arrived at 10h20 on 29 September 2016 to execute the warrant comprised 26 officials, including 16 police officers (among them, dog handlers). However only one police officer not named in the warrant accompanied the search party. The remaining unnamed officers waited in their vehicles. The contingent did not include any representatives from the DMR. Although the warrant included the names of two mining inspectors, at the last minute they were instructed by their superior to withdraw because the DEA insisted that police officers form part of the search party.

[80] Ms Meissenheimer handed to MSR's representative, Mr van der Poll (the mine security officer), a copy of the warrant together with the supporting affidavits and attachments. The search finished at around 18h00. Various documents were seized. Photographs and measurements were taken. Whether samples were collected does not appear. The documents were returned several weeks later after copies had been made.

[81] MSR launched the present proceedings on 18 October 2016.

The delay from May 2015 to September 2016

[82] In their answering papers the respondents explain the delay from 26 May 2015 to 28 September 2016 as follows. Because of MSR's uncooperative position, the DEA had to ensure 'that it was on a sound legal footing before non-consensually obtaining evidence which could withstand challenge in a criminal court'. MSR's challenge to the DEA's authority 'required careful consideration'. MSR made this challenge shortly after the coming into effect of the legislative amendments. The transitional provisions were 'highly complex'. Before acting the DEA had to 'satisfy itself of its continued jurisdiction to enforce environmental laws on mining sites'.

[83] Furthermore, the cooperative governance provisions of the Constitution called for consultation between the DEA, DMR, DPWC and Municipality.

[84] The respondents do not say what steps they took to satisfy themselves of the DEA's continued jurisdiction. If they obtained legal advice, they do not disclose when and by whom it was furnished.

[85] The consultation between the various state agencies seems only to have started in July 2016. This led to the establishment of a task team with representatives from the various agencies and with the DEA as the 'lead agency'.

[86] Delay is not in itself a basis for impugning the warrant. What can be said with confidence is that, given the leisurely way in which the DEA proceeded, this was not a case where shortcomings in the application for the warrant could be excused on the grounds that urgent action was needed. Furthermore the significant interaction between the various agencies justifies as a reasonable inference that material information known to the DPWC and DMR was probably shared with and known to the DEA.

Ms Meissenheimer's mandate as national inspector (the mandate attack)

[87] MSR contends that Ms Meissenheimer, as a national inspector, did not have the mandate to investigate any of the suspected contraventions apart from the

dumping charge. MSR's argument is that, save in the circumstances set out in s 31D(4)-(9) of NEMA, the investigation of the other four suspected contraventions was exclusively the domain of mining inspectors. The respondents accept in argument, correctly so, that if Ms Meissenheimer's powers of inspection were restricted in the manner contended for by MSR, she did not have the power in terms of s 31H(5) to apply for a search warrant. This flows from the fact that in terms of s 31D(5) an inspector only has the powers conferred by Chapter 2 of the CPA on a peace officer or police official 'to comply with his or her mandate in terms of section 31D', ie for purposes of complying with such mandate. (I shall refer to this ground of review as the mandate attack.)

[88] The respondents also appeared to concede that only the dumping charge was exempt from the mandate attack. This ground of attack would definitely strike at the jetty charge, the increased footprint charge and the road charge, since those charges are concerned with activities relating to mining in respect of which the Mining Minister is the competent authority and over which the mining inspectors have jurisdiction. MSR correctly acknowledges that the mandate attack does not strike at the dumping charge since the Mining Minister has no jurisdiction to grant a dumping permit in terms of the Coastal Act and the mining inspectors have no mandate to enforce the Coastal Act.

[89] The position regarding the failing cliff charge is less straightforward. The alleged statutory offence, s 49A(1)(e), is not concerned with listed activities. The charge is not that MSR breached the terms of its environmental authorisation by moving the PBCs from the beach to the SCP site. The charge is the unlawful and culpable causing of significant degradation of the environment. Although the alleged offending conduct occurred at a mine and in the course of mining operations, the Mining Minister's competence in NEMA is not defined territorially (ie with reference to conduct occurring within a mining area) but with reference to listed activities for which he is the competent authority. On this view, mining inspectors would not have the mandate to investigate contraventions of s 49A(1)(e).

[90] On the other hand, s 38A of the Mining Act states that the Mining Minister is the responsible authority for implementing NEMA's environmental provisions insofar

as they relate to mining and related incidental activities on a mining area. The term ‘mining area’ is defined in s 1 of the Mining Act and would include the Tormin mine. Section 38A is headed ‘Environmental authorisations’. It is possible that the section should be construed as simply confirming that the Mining Minister is the competent authority for granting environmental authorisations in respect of mining activities. MSR’s counsel submitted that s 38A has wider effect and applies to all the provisions of NEMA insofar as they bear on things which happen in a mining area. On this view, the Mining Minister would be responsible for implementing all of NEMA’s provisions relating to environmental degradation, including the offence created by s 49A(1)(e). The mandate of mining inspectors would thus include the investigation of suspected contraventions of s 49A(1)(e). The solution would have in its favour the avoidance of bifurcated NEMA inspections.

[91] I need not finally decide whether the failing cliff charge falls within the mandate of the mining inspectors. This is because there is, in my view, a separate basis on which the warrant should be set aside in relation to the failing cliff charge (more of this later). I am reluctant to decide the question because it was not fully argued. I rather gained the impression that the respondents themselves accepted that the mandate attack, if sound, struck at all the charges other than the dumping charge. It was only in preparing this judgment that I had reason to doubt the correctness of that approach.

[92] On the face of it, there is no limit on the mandates which can be conferred on national inspectors and water inspectors in terms of s 31D(1). The Environment Minister and the Water Minister may appoint national inspectors and water inspectors for the enforcement of NEMA and all specific environmental management Acts. It may be (I do not know) that in practice the Water Minister only appoints water inspectors to enforce the provisions of the Water Act but there is nothing in NEMA which prevents the Water Minister from appointing water inspectors to enforce NEMA or which prevents the Environment Minister from appointing national inspectors to enforce the Water Act.

[93] In regard to provincial inspectors, s 31D(2) provides that such inspectors may only be appointed for the enforcement of those provisions of NEMA or other specific

Acts as are administered by the province or in respect of which the province exercises or performs assigned or delegated powers or duties. Subject to this limitation, their mandates can apply to all the provisions of NEMA and specific Acts. It is not necessary in this case to decide whether national inspectors and water inspectors are entitled to enforce environmental provisions which are administered by the province. NEMA itself does not suggest such a restriction though it might perhaps be supported on the basis that, in terms of s 125(2)(b) of the Constitution read with Part A of Schedule 4, it is the function of the provinces to implement national legislation within the functional area of the environment.

[94] As with provincial inspectors, mining inspectors cannot be appointed with unlimited mandates. In terms of s 31D(2A) the Mining Minister can only appoint mining inspectors to monitor and enforce environmental legislation in respect of which powers are conferred on the Mining Minister. Powers are conferred on the Mining Minister as the competent authority to grant environmental authorisations in respect of listed activities directly relating to mining (s 24C(2A)). Mining inspectors can thus monitor and enforce compliance with the terms of environmental authorisations issued in respect of mining activities and can monitor and enforce compliance with those statutory provisions which are applicable where a person unlawfully engages in an activity for which an environmental authorisation from the Mining Minister should have been obtained (particularly ss 24F and 24G).

[95] If s 31D ended with subsection (2A), there would be no basis for finding that national inspectors and water inspectors with unlimited mandates do not have concurrent jurisdiction to enforce matters which mining inspectors are competent to enforce. Of course, it would be administratively inefficient and potentially unfair to persons identified for investigation that they should be subjected to parallel investigations and potentially contradictory instructions but the solution to those sorts of problems lies in sensible official cooperation rather than strained legal distinctions. (The long title, preamble and s 12(a) of NEMA would require the various agencies to cooperate and avoid duplication.)

[96] However, the view that national inspectors and water inspectors have concurrent jurisdiction with mining inspectors over mining matters makes a mockery

of ss 31D(4)-(9). Subsection (4) takes for granted that in the ordinary course s 31D(2A) would have the effect of conferring exclusive jurisdiction on mining inspectors. But despite s 31D(2A), so says subsection (4), the Environment Minister may, with the Mining Minister's concurrence, appoint national inspectors to enforce environmental legislation in relation to mining if the mining inspectors are unable or not adequately able to fulfil their monitoring and enforcement functions. The Environment Minister may not follow this course unless the Mining Minister agrees; it is not enough for the Environment Minister to consult with the Mining Minister. If national inspectors in any event had concurrent jurisdiction to monitor and enforce environmental legislation in relation to mining, the preconditions in s 31D(4) would be unnecessary.

[97] The same is true of subsections (5)-(9). One has there an elaborate scheme to deal with the case where someone complains that the mining inspectors are not adequately performing their functions. The complaint must be referred to the Mining Minister. If the complainant is dissatisfied with the response, he may refer it to the Environment Minister, whereafter the Environment Minister must consult with the Mining Minister. Following such consultation, but only with the Mining Minister's concurrence, the Environment Minister may assist the Mining Minister to perform the function or direct national inspectors as contemplated in subsection (4) to perform the function. The Environment Minister must inform the complainant of the steps taken in response to the complaint. This carefully crafted procedure would be unnecessary if, from the outset and without the concurrence of the Mining Minister, national inspectors could monitor and enforce compliance with environmental legislation relating to mining.

[98] Although the mandates of national inspectors, water inspectors and provincial inspectors may overlap, there is no doubt that efficient administration is generally better served by non-overlapping mandates. This would be achieved by interpreting s 31D so as to give mining inspectors exclusive jurisdiction to monitor and enforce environmental legislation relating to mining except where one or other of the circumstances set out in ss 31D(4)-(9) applies. This interpretation best gives effect to the One Environmental System agreement. Although there is only one national government, the One Environmental System agreement is, unusually, an agreement

between three national Ministers. Prior to the coming into operation of the One Environmental System, mining as such was not a listed activity regulated by NEMA. The DMR might well have been cautious about allowing matters previously within its domain to pass to the control of the DEA.

[99] The new s 38A of the Mining Act also lends some support to this interpretation. It provides that the Mining Minister is the responsible authority for implementing environmental provisions in terms of NEMA as it relates to mining. There is no comparable provision in the case of the Water Minister or the MEC. There are also the passages from the explanatory memorandum which I previously quoted and which explain why it was important for the Mining Minister to be given the power to enforce the provisions of NEMA in relation to mining and why it was appropriate to allow for exceptions if there were capacity challenges within the DMR or complaints from outside.

[100] A similar regime to that laid down in s 31D(5)-(9) applies where an applicant for an environmental authorisation from the Mining Minister is dissatisfied because a decision on the application has not been made within the prescribed time-frames – see s 24C(2C)(a)-(f). Following a process of consultation with the Mining Minister, the Environment Minister may make the decision. There can be no doubt that in this setting the Environment Minister's right to grant the environmental authorisation exists only if the circumstances identified in s 24C(2C) are present and if the procedure laid down in that subsection has been followed.

[101] In *Berg River Municipality v Zelpy 2065 (Pty) Ltd* 2013 (4) SA 154 (WCC) paras 27-31 I discussed and gave my understanding of the leading authorities on implying terms into statutes. In my view it is necessary to imply, in ss 31D(1), a qualification that inspectors appointed under that provision may not exercise the powers contemplated in s 31D(2A) unless so designated pursuant to s 31D(4) or s 31D(8)(b). Effect cannot be given to the clear intention of the lawmaker without implying such a qualification.

[102] Mr Paschke, who argued the respondents' case with conspicuous ability, submitted that, if this were my view, I should find that there had been substantial

compliance with ss 31D(5)-(9) so that Ms Meissenheimer should be regarded as having been duly designated in terms of s 31D(8)(b). I cannot accept this fallback submission. Nowhere in the papers did the respondents allege substantial compliance with these provisions or claim that anyone ever purported to act in terms of them. There is no evidence that the respective Ministers consulted with each other; or that the Mining Minister agreed that the Environment Minister could designate a national inspector to undertake monitoring and enforcement functions in relation to MSR; or that the Environment Minister designated Ms Meissenheimer pursuant to s 31D(8)(b). Ms Meissenheimer purported to act in terms of her ordinary designation pursuant to s 31B read with s 31D(1).

[103] Mr Paschke also argued that Ms Meissenheimer's mandate from the Environment Minister did not contain any qualification and that in terms of the *Oudekraal* principle[4] her designation and mandate stood until set aside. Again I disagree. I have found that the qualification previously mentioned must of necessity be implied in s 31D(1). The same qualification, in my view, must of necessity be implied in the mandates issued by the Environment Minister, Water Minister and MEC.

[104] It follows that Ms Meissenheimer was not entitled to apply for the warrant in relation to the jetty charge, the increased footprint charge and the road charge. She did have the mandate to apply for the warrant in relation to the dumping charge. Whether she had the mandate to apply for the warrant in relation to the failing cliff charge is something which I do not intend to decide.

Non-disclosure

[105] An investigator who applies ex parte to a judicial officer for a search warrant is under a duty of good faith to disclose any material fact of which he or she is aware that might influence the judicial officer in coming to a decision (*Powell NO & Others v Van der Merwe NO & Others* 2005 (5) SA 62 (SCA) para 42; *Thint (Pty) Ltd v National Director Of Public Prosecutions & Others; Zuma & Another v National*

[4] *Oudekraal Estates (Pty) Ltd v City of Cape Town* 2004 (6) SA 222 (SCA).

Director Of Public Prosecutions & Others 2009 (1) SA 1 (CC) para 102). In *Powell* Cameron JA said that the investigator had to be 'ultra-scrupulous' in making disclosure. In *Thint* Langa CJ, while quoting this statement with apparent approval, observed that, particularly in a complex and vast case such as was under consideration in *Thint*, there was no 'crystal-clear distinction' between material and non-material facts. The official would need to exercise judgement. The test for materiality should not be set so high as to render it practically impossible for the state to comply with its duty of disclosure.

Suggestion of recent complaints?

[106] MSR complained that the application for the search warrant created the false impression that the DEA was acting on recent complaints whereas there had been a lull of 16 months. I do not think that this complaint has merit. Mr Dlulane stated that the complaint was received at the beginning of 2015. He did not talk about more recent complaints.

The mandate dispute

[107] A more substantial criticism is that the DEA failed to disclose that as from 8 December 2014 the DMR had become the competent authority in respect of the environmental aspects of MSR's mining activities, that MSR had on this basis challenged the mandate of the DEA to investigate MSR's alleged environmental contraventions and that this point had been debated at some length in correspondence between MSR and the DEA.

[108] The DEA alleged in its application that MSR was denying access to its inspectors, raising a suspicion of illegal activity, whereas in truth MSR's assertion was that the DEA's national inspectors did not have the mandate to conduct the inspection. MSR would not have resisted an inspection by mineral inspectors. The DMR's inspectors did in fact visit the site and were satisfied as to the legality of MSR's operations.

[109] The high-water mark of disclosure on this aspect was Mr Dlulane's statement that MSR questioned his authority and whether he was designated as an inspector. Mr Dlulane alleged that, as an inspector responsible for enforcing the Coastal Act, he had authority to investigate any incidents causing adverse effects in the coastal environment.

[110] I am satisfied that this falls far short of what should have been disclosed. MSR's central objection to an inspection by national inspectors was that, by virtue of the legislative changes effected as from 8 December 2014, the national inspectors did not have the mandate to conduct the inspection. The Magistrate was not alerted to these legislative changes. None of the correspondence in which the point was ventilated was disclosed to him. The Magistrate had no opportunity to apply his mind to the legal questions which I have addressed at some length. The point was one of substance. I have ultimately upheld MSR's contention insofar as it relates to the jetty charge, the increased footprint charge and the road charge. Whether the mandate attack strikes at the failing cliff charge is a debatable point – there are fair arguments on both sides.

[111] Mr Paschke submitted that a legal point is either good or bad. If MSR's legal point were good, it would be a sufficient basis for impeaching the warrant (as indeed I have concluded on three of the five charges); if the legal point were bad, the point would be revealed as non-material. I reject that submission. The duty of disclosure is aimed at ensuring that a judicial officer, who is being asked to act prejudicially against a party who does not have the protection of being heard, can apply his mind to the issues materially bearing on his decision. If there was a legal issue of substance, it was for the Magistrate, not the DEA, to decide it. Materiality is for the court, not the litigant and the latter's advisers.

[112] The duty of disclosure underlies the related duty of legal practitioners, particularly in ex parte proceedings, to draw to the court's attention any authority which may have the effect of disentitling their client to relief (see *Ex Parte Hay Management Consultants (Pty) Ltd* 2000 (3) SA 501 (W) at 507A-B). In England it has been held that there is no fundamental distinction between a litigant's duty of full

disclosure of material facts and his legal representatives' duty to assist the court by reference to (or a correct summary of) relevant authorities, statutory provisions and practice directions (*Memory Corporation plc v Sidhu (No 2)* [2002] 1 WLR 1443 (CA) at 1454C-H *per* Robert Walker LJ and at 1460A-B *per* Mummery LJ).

[113] In *Schlesinger v Schlesinger* 1979 (4) SA 342 (W), one of our leading authorities on the duty of disclosure in ex parte proceedings, the applicant sought to set aside an ex parte order obtained by the respondent because the respondent had failed to disclose that the applicant was contending in foreign proceedings that he was not domiciled in South Africa (a matter relevant to jurisdiction). Le Roux J said that a litigant in ex parte proceedings could not omit any reference to a fact or attitude of his opponent which was relevant to the point in issue just because the litigant did not accept its correctness (352D).

[114] In England, Australia and New Zealand it is part of the duty of good faith in ex parte proceedings to anticipate and deal fairly with defences which the affected person could be expected to raise (see, eg, *JSC Mezhdunarodniy Promyshelnniy Bank v Pugachev* [2014] EWHC 4336 (Ch) paras 171-172; *Orpen v Tarantello* [2009] VSC 143 para 27; *Tranz Rail Ltd v Wellington District Court* [2002] 3 ZNZLR 780 (CA) paras 21-22). All the more would this be so where the affected person has in fact raised a point of substance in previous correspondence. In Australia, Dixon J said the following in *Thomas A Edison Ltd v Bullock* (1912) 15 CLR 679 at 681-682 (a passage often cited with approval)*:*

‘Uberrima fides is required, and the party inducing the Court to act in the absence of the other party, fails in his obligation unless he supplies the place of the absent party to the extent of bringing forward all the material facts which that party would presumably have brought forward in his defence to that application. Unless that is done, the implied condition upon which the Court acts in forming its judgment is unfulfilled and the order so obtained must almost invariably fall.’

(See also *Towns & County Sport Resorts (Holdings) (Pty) Ltd & Others v Partnership Pacific Ltd* (1988) 20 FCR 540 paras 14-16.)

[115] Canadian law is to similar effect. The ex parte litigant must disclose all points of fact and law known to it which favour the other side (*United States of America v*

Friedland [1996] OJ No 4339 paras 26-27; *The Commissioner of Competition v Labatt Brewing Company Ltd & Others* 2008 FC 59 (CanLII) paras 22-25).

[116] In my view the same standards apply to an ex parte applicant in this country.

[117] The affidavits of Ms Meissenheimer and Mr Dlulane created the misleading impression that MSR had something to hide and was thus unjustifiably questioning whether Mr Dlulane was a duly appointed inspector. That was not the case. The Magistrate could not have been expected to be familiar with the intricacies of environmental legislation and of the recent introduction of the One Environmental System. The DEA should have fairly disclosed the mandate issue, including MSR's principal contentions as disclosed in the correspondence. The mandate issue was relevant not only to MSR's resistance to Mr Dlulane's attempted inspection but more fundamentally to the question whether the DEA was entitled to apply for the warrant.

[118] The DEA's non-disclosure is particularly egregious in view of the respondents' assertion in the present proceedings that the need to investigate the soundness of MSR's challenge and the complexities of the legislation was one of the main reasons for the delay in applying for a warrant. The respondents must have anticipated that MSR would challenge the warrant on the very basis it subsequently did. In the circumstances the DEA's failure even to alert the Magistrate to the point is baffling. In their heads of argument the respondents' counsel said that it had been unnecessary to 'swamp the Magistrate with highly complex, and ultimately irrelevant, legal arguments about jurisdiction'. This was not counsel's best point. Apart from the fact that the Magistrate, unlike the inspectors, was a judicial officer, and that it was for him and not the DEA to decide the issue, the issue was anything but irrelevant.

[119] If the DEA had fairly disclosed the mandate issue, the Magistrate might have decided the point against the DEA or might have refused to issue the warrant (except in relation to the dumping charge) until the legal issue was determined by the High Court.

[120] I must add that Mr Dlulane's assertion before the Magistrate that he had jurisdiction because he was responsible for enforcing the Coastal Act was calculated (I do not say deliberately) to lead the Magistrate further astray. Only one of the five charges concerned a contravention of the Coastal Act. Mr Dlulane's assertion would have created the impression in the Magistrate's mind that Mr Dlulane in law had jurisdiction over NEMA contraventions provided they occurred in a coastal environment. That contention had not been advanced by Mr Dlulane in his correspondence with MSR (in the correspondence he said he was authorised to investigate contraventions of the Coastal Act and the Coastal Regulations) or by the respondents' counsel in the present litigation.

[121] In my view, therefore, non-disclosure is a basis for setting aside the warrant in respect of all the charges other than the dumping charge. I have considered whether I should exercise my discretion against setting aside the warrant in relation to the failing cliff charge (cf *Thint* para 117). I do not think so. I regard the non-disclosure as substantial, particularly in view of the inaccurate impression created by Mr Dlulane's affidavit. Furthermore it would not be right to exercise my discretion in the respondents' favour without finally deciding that national inspectors have the mandate to investigate the failing cliff charge. I have explained why I am reluctant to make a final decision on that question.

[122] In respect of the dumping charge, there has never been a suggestion by MSR that national inspectors do not have jurisdiction to investigate the alleged contravention. There was thus no legal issue which needed to be drawn to the Magistrate's attention in that regard.

Facts relating specifically to the failing cliff complaint

[123] MSR complains that the DEA failed to disclose MSR's views regarding the reasons for the cliff failure. The affidavits in the present case contain a good deal of material regarding the reasons for the cliff failure. It is neither necessary nor possible to resolve the disputes on the papers. I confine myself to what was placed before the Magistrate and what could reasonably have been expected to be placed before him.

[124] The affidavit of Ms Meissenheimer regarding the failing cliff charge is extremely terse. She said it was clear from three photographs supposedly taken on dates in March 2012, July 2013 and February 2016 that the cliff had collapsed. Mr Dlulane's affidavit listed various 'suspected illegal activities', being a verbatim extract from the FT document. These activities included

'run-off from the processing plant as a result of unauthorized processing method changes resulting in erosion and cliff failure; operating within 10 m of the toe of the cliff in contravention of approval conditions.'

[125] In the FT document the activities just quoted were part of a list of activities said to have been highlighted in previous letters sent to the DMR, DEA, DPWC and Municipality. The main purpose of the FT document was to provide information about 'further transgressions'. One of these was headed 'cliff failure'. The author stated that, due to increased unauthorized activities and a refusal to implement mitigation measures to contain the increased ponding of water and run-off from the site, the cliff face had experienced 'further failure'. Several photographs were included which were said to show uncontained water and run-off. The photographs showed that the failed cliff was located immediately beneath the SCP site. While this could be coincidental, it is a factor to be taken into account when deciding whether there were reasonable grounds for suspecting that unauthorized activities at the SCP site had contributed to the cliff failure.

[126] Mr Hodes submitted that no regard should be had to the FT document because it was hearsay and was thus not information on oath such as is contemplated by s 21(1)(a) of the CPA. Mr Paschke responded by referring me to para 38 of *Powell* where Cameron JA said that the investigator unavoidably had to rely on evidence on oath supplied to her by a witness who at that stage was not willing to come on record. Cameron JA's approach is not directly in point because there the witness had made an affidavit but was not willing to be identified. In the present case Ms Meissenheimer did not have an affidavit from the author of the FT document. Nevertheless in *Powell* the investigator's assertions under oath, to the extent that they relied on the anonymous deponent, were technically hearsay. The broader thrust of *Powell* is captured in para 35 where Cameron JA approved a test for reasonable suspicion as being one formed 'on the basis of diverse factors,

including facts and pieces of information falling short of fact, such as allegations and rumours'. In *Van der Merwe v Minister van Justisie en 'n Ander* 1995 (2) SACR 471 (O) the court held that 'information' in s 21 of the CPA included hearsay evidence (482h-485h and 486g-h).

[127] The FT document was not self-evidently a piece of baseless scandal-mongering. The text is well written and displays some understanding of the mining operation and environmental legislation. Key allegations were supported by photographs. Ms Meissenheimer believed that the Google Earth images forming part of her affidavit confirmed some of the allegations in the FT document. In my view the Magistrate was entitled to have regard to the FT document in determining whether there were reasonable grounds for suspecting that the offences under investigation had been or were being perpetrated.

[128] The evidence in Ms Meissenheimer's affidavit and the FT document sufficed to establish a reasonable suspicion that the cliff had failed because of an unauthorized change in the mining operations. What countervailing evidence was available to the DEA? The DEA had knowledge of the environmental authorisation granted to MSR on 25 July 2012 and of the NEMA EMP approved at the same time. The EMP recorded that it was evident, from the various sea-facing slope failures observed along the coastline, that storm surf is a destabilising force undercutting the bases of the sea-facing slopes and that this is more evident where the slopes comprise reddish orange sands rather than light grey or white sands. This was one of the reasons for imposing a 10 m buffer zone between mining operations and the toe of the cliff. This information was repeated in the amended Mining EMP submitted to DMR on 2 December 2014 and was presumably also in the amended NEMA EMP which MSR submitted to the DPWC but allowed to lapse.

[129] In support of the original environmental authorisation and NEMA EMP (and as an attachment to the application), MSR obtained a geotechnical report from Davies Lynn & Partners. This report noted widespread evidence of undercutting of the upper portion of the beach profile and the bases of sea-facing slopes, the primary causal factor being marine erosion.

[130] The FT document, and Mr Dlulane's repetition of it, would have created the impression that MSR's illegal mining within the 10 m buffer zone had contributed to the cliff failure. The DEA did not disclose, in its application to the Magistrate, that the provincial inspectors' inspections of 16 July 2014 and 24 February 2015 established that no mining had occurred in the 10 m buffer zone (the second inspection revealed alleged mining in a conservation area but this is unrelated to the cliff).

[131] Although the DEA's application disclosed that an amended EMP was approved by the DMR on 14 April 2015, the application did not disclose that one of the amendments thereby approved was the locating of the PBCs on the SCP site.

[132] The failing cliff complaint was not one of the complaints raised in Mr Dlulane's correspondence with MSR in April/May 2015. MSR thus had no occasion in that correspondence to deal with an assertion that it had unlawfully and culpably caused the cliff to fail. However on 24 June 2015 MSR wrote to the DMR, noting with concern the continued gradual degradation of the cliff face in front of the processing area (this suggests that the collapse was not complete) and proposing ways of rehabilitating the area. MSR stated that the 'gradual degradation and collapse' was

'partially, as a result of the diamond mining that has occurred for more than 50 years on the area and, partially, natural condition of the very rough West Coast'.

(The area of MSR's sand mining rights overlay a diamond concession held by the Trans Hex which was mining for diamondiferous gravels in the area. According to MSR, Trans Hex is permitted to mine within 5 m of the cliff toe.)

[133] In October 2015 MSR submitted to the DMR a report on the cliff failure authored by Mr A du Toit of MRC. In this report Mr du Toit noted the historical failure of cliffs in this area by natural erosion and undercutting by the sea. He said that the main reason that the cliffs in the vicinity of the Tormin mine are unstable is because they consist of unconsolidated young marine, alluvial and erosional sediments. They were subject to failure before MSR began mining in the area. The main reason, in his view, for failures in this area was the undercutting of the cliff face by wave activity.

[134] There was a dispute in this court regarding Mr du Toit's qualifications and independence. The respondents submitted a rebutting opinion from Mr JH van der Waals, a soil scientist. The question is not, however, which of the expert opinions is to be preferred; it would be impossible on the papers to do so. What is important is that Mr du Toit's report was compiled and submitted to the DMR about 11 months before Ms Meissenheimer applied to the Magistrate for the warrant. Mr van der Waals, by contrast, did his report in December 2016 for purposes of the current litigation. It was not information available to the DEA when it applied for the warrant.

[135] The respondents do not deny that MSR sent to the DMR the letter of 24 June 2015 or that MSR submitted Mr du Toit's report to the DMR in October 2015. The respondents' principal deponent, Mr Walters, describes the extensive interaction which occurred between the DEA, the DMR, the DPWC and the Municipality over the period June 2015 to September 2016. Mining inspectors from the DMR were intended to form part of the search contingent, only withdrawing on the morning it was executed. Ms Meissenheimer had knowledge of the amended EMP approved by the DMR on 14 April 2015. The respondents do not say that Ms Meissenheimer and Mr Dlulane did not have knowledge of the letter of 24 June 2015 or of Mr du Toit's report of October 2015. Since para 43.4 of MSR's founding affidavit referred specifically to Mr du Toit's report in the context of an alleged non-disclosure in respect of the failing cliff charge, I would have expected – if Ms Meissenheimer and Mr Dlulane were unaware of the document – that the respondents would have said so.

[136] The question is whether the DEA should have disclosed the above matters in the ex parte application. The DEA only needed to satisfy the Magistrate that there was a reasonable suspicion that the failing cliff offence had been committed. If an investigator has knowledge of compelling or irrefutable facts, the disclosure of which might reveal his suspicion to be unreasonable, the investigator must clearly disclose such facts in his application. Here, however, disclosure of MSR's position would not have revealed the DEA's suspicion as being unreasonable. The Magistrate would not have been able, on the papers, to determine the true cause of the cliff failure, any more than I would be able to do on the fuller papers now before me.

[137] In *Cometal-Mometal SARL v Corlana Enterprises (Pty) Ltd* 1981 (2) SA 412 (W) Margo J, while finding that there was a non-disclosure, exercised his discretion against setting aside an ex parte attachment order since the applicant only needed to make out a prima facie case, a requirement which could be met even if the balance of probabilities on the papers was against the applicant. In *Rosenberg & Another v Mbanga & Others (Azaminle Liquor (Pty) Ltd Intervening)* 1992 (4) SA 331 (E) Van Rensburg J in similar circumstances seems to have been of the view that there was no duty to disclose the facts in question (at 336F-337G). I would not wish to dilute the duty of a litigant in ex parte proceedings to make fair disclosure. I think the DEA should fairly have disclosed MSR's view on the causes of the cliff failure. However, for reasons similar to those mentioned in the preceding cases, I do not think in the present case that the non-disclosure should result in the setting aside of the warrant.

Facts relating specifically to the dumping charge

[138] As with the failing cliff charge, MSR complains that the DEA failed to disclose MSR's views on the dumping charge. The dumping charge was not foreshadowed in the correspondence of April/May 2015. I have not been able to find any relevant documents setting out MSR's views on the charge. I thus do not think that this particular criticism is justified.

Reasonable grounds for suspicion in relation to the dumping charge

[139] However the argument on the dumping charge went wider than the non-disclosure complaint. MSR's counsel submitted in their heads of argument that the evidence placed before the Magistrate was too confused and vague to constitute reasonable grounds for suspecting that MSR was dumping at sea in violation of the Coastal Act. Although the respondents' counsel objected to this line of argument on the basis that it was not one of the grounds of review contained in the founding papers, the matter was fully traversed by both sides in written and oral argument.[5] Since MSR's contention is a question of law to be judged with reference solely to the

[5] In the respondents' case, the dumping charge is dealt with in paras 159-166 of their main heads and in sheet 3.4 of their counsel's very helpful 'mind map'.

content of the application before the Magistrate, I do not think it would be right to preclude reliance thereon. A point of law may be raised for the first time even on appeal if the facts upon which the point depends are common cause or clear beyond doubt from the record and there is no ground for thinking that further or other evidence would have been produced had the point been raised at the outset (*Paddock Motors (Pty) Ltd v Igesund* 1976 (3) SA 16 (A) at 23D-H; *Quartermark Investments Pty Ltd v Mkhwanazi & Another* 2014 (3) SA 96 (SCA) para 20). The same applies a fortiori in motion proceedings before a court of first instance (see, eg, *Stiegelmeyer Africa (Pty) Ltd v National Treasury of South Africa & Others* [2015] 2 All SA 110 (WCC) paras 48-53).

[140] The original EMP required MSR to return tailings from the SCP to the beach by ADTs. Excavators would shovel the tailings back into the mined-out area and the beach would be restored by tidal action. The amended Mining EMP approved on 14 April 2015 authorised MSR to return the tailings to the beach by pipeline rather than ADTs.

[141] There appears to have been a period prior to 14 April 2015 during which MSR returned tailings to the beach by pipeline in contravention of the original EMP. This, however, is not one of the five charges. In regard to the tailings, the charge was one of dumping at sea without a permit. The alleged contravention of s 70(1)(e) of the Coastal Act is unrelated to the method by which the tailings are dumped.

[142] It is unclear whether the amended EMP provides for the tailings to be pumped to the beach or into the sea. The application for the amended NEMA EMP (the one which MSR allowed to lapse) said that the tailings would be pumped to the beach.[6] The amended Mining EMP speaks variously of the tailings being pumped to the beach[7], directly into the sea[8] or possibly both[9]. The amended EMP still makes reference to the backfilling of mined-out areas with excavators,[10] which would make sense only if the tailings were pumped to the beach.

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[6] pp 657-658.
[7] pp 729.
[8] pp 687, 731.
[9] p 733.
[10] p 842.

[143] Ms Meissenheimer's affidavit stated that photographs forming part of the FT document revealed that tailings were being disposed of into the sea. It is impossible to see this from the Google Earth image included in her affidavit and which she said confirmed the allegation.

[144] The allegation made in the FT document is that MSR began pumping tailings to the beach prior to approval of the amended EMP. The FT document stated that the s 102 amendment application 'has not yet been approved'. While that may have been true when the FT document was compiled (presumably before 14 April 2015), it was not true when the DEA applied to the Magistrate for the warrant in September 2016. Although Ms Meissenheimer said that the DMR had approved an EMP on 14 April 2015, the Magistrate could not have known that the EMP of 14 April 2015 constituted the granting of the s 102 application. The Magistrate would have been under the impression that the pumping of tailings was currently unapproved.

[145] More importantly, the FT document did not support Ms Meissenheimer's assertion that MSR was dumping the tailings in the sea (as that term is commonly understood); the FT document said that the tailings were being pumped to the beach.

[146] Mr Paschke pointed out that the word 'sea' is defined in the Coastal Act as including land regularly submerged by seawater. This would include the intertidal zone. So, in the language of the Coastal Act, tailings returned to the intertidal zone are disposed of in the 'sea' even though in common parlance the operation would appear to be a disposal of tailings on the beach. He said that one could observe from the Google Earth image included in Ms Meissenheimer's affidavit that there were tailings in the intertidal zone. Without further information (which Ms Meissenheimer did not furnish), I do not accept that one can make this deduction. It would not surprise me, though, if it were true. MSR was authorised to conduct mining in the intertidal zone. It could construct sea walls to protect the mining pit. MSR was required by the NEMA EMP and the Mining EMP to return tailings to the beach where they would be placed in the mined-out area. So far from being a bad thing, this was aimed at allowing the beach to be restored to its natural condition through tidal action.

[147] The FT document stated that, although the tailings were required to be returned to the mined-out area, MSR was in fact returning them to only one area of the beach. This may be a reference to MSR's attempt to rehabilitate the failed cliff by placing tailings at the foot of the cliff. (There are photographs of this in the FT document. In its letter to the DMR of 24 June 2015, MSR proposed that tailings be pumped directly over the failed area to assist in re-establishing the slope.) However this was not the charge against MSR. There was no evidence before the Magistrate that the beach at the toe of the cliff forms part of the 'sea' as defined in the Coastal Act.

[148] There thus seems to me to have been hopeless confusion in the DEA's application as to what was being alleged. The FT document, which was Ms Meissenheimer's professed source, did not support her allegation of tailings being pumped into the sea. The FT document may have been claiming that MSR was not returning the tailings to the mined-out area but was instead pumping them to the foot of the failed cliff. While that may have violated the original and amended EMP, it did not provide evidence that the tailings were being disposed of on a part of the beach qualifying as the 'sea' as defined in the Coastal Act.

[149] If Ms Meissenheimer intended to allege that the tailings were being returned to the mined-out area in the intertidal zone, the Magistrate was at least entitled to know that this is precisely what MSR was required to do by the EMPs approved by the DMR and DPWC respectively. It is true that MSR might still strictly have needed a dumping permit from the Environment Minister in terms of s 71 of the Coastal Act. The NEMA environmental authorisation stated that the authorisation did not exempt the holder from complying with any other statutory requirements applicable to the undertaking of the listed activities. Nevertheless the contravention would almost certainly have been unwitting and somewhat technical. MSR would have had no reason to think that the Environment Minister would refuse to authorise the return of the tailings to mined-out areas in circumstances where the DMR and DPWC had stipulated this modus operandi for sound environmental reasons.

[150] Furthermore I very much doubt that the DEA would have applied for a search warrant if MSR's only misdemeanour were its failure to apply for a dumping permit

so that it could give effect to its obligations under the EMPs. A search warrant would hardly be needed to make good a charge for the technical infraction. As I have said, the EMPs required MSR to return the tailings to the mined-out area. The EMPs make clear that most of the mining was to take place in the intertidal zone. Since MSR has been mining in this way for more than two years, the DEA could safely assume that MSR has returned tailings into the intertidal zone.

[151] In the light of the confusion, I do not think the application to the Magistrate established reasonable grounds for suspecting that MSR was guilty of the dumping charge. And if, contrary to my view, the DEA's application is to be understood as alleging dumping at sea by returning the tailings to the mined-out area in the intertidal zone, there was a non-disclosure that this is precisely what the EMPs required. If the facts in that regard had been fairly placed before the Magistrate, he may well have concluded that a search warrant was not needed.

[152] I have assumed thus far that the return of tailings to the intertidal zone qualifies as 'dumping at sea'. There was some argument on this question. The full definition of 'dumping at sea' reads thus:

' "dumping at sea" means –

(a) any deliberate disposal into the sea of any waste or material other than operational waste from a vessel, aircraft, platform or other man-made structure at sea;

(b) any deliberate disposal into the sea of a vessel, aircraft, platform or other man-made structure at sea;

(c) any storage of any waste or other material on or in the seabed, its subsoil or substrata; or

(d) any abandonment or toppling at site of a platform or other structure at sea, for the sole purpose of deliberate disposal, but "dumping at sea" does not include –

(i) the lawful disposal at sea through sea out-fall pipelines of any waste or other material generated on land;

(ii) the lawful depositing of any substance or placing or abandoning of anything in the sea for a purpose other than mere disposal of it; or

(iii) disposing of or storing in the sea any tailings or other material from the bed or subsoil of coastal waters generated by the lawful exploration, exploitation and

associated off-shore processing of mineral resources from the bed, subsoil or substrata of the sea.'

[153] The definition of 'waste' should also be noted:

'"waste" means any substance, whether or not that substance can be re-used, recycled or recovered –

(i) that is surplus, unwanted, rejected, discarded, abandoned or disposed of;

(ii) that the generator has no further use of, for the purposes of production, reprocessing or consumption; and

(iii) that is discharged or deposited in a manner that may detrimentally impact on the environment'.

[154] MSR submitted that the tailings are not 'waste' as defined in the Coastal Act. The tailings comprise sand (quartz grains – ie beach sand without the heavy minerals) and seawater. There is no foreign matter in the tailings. The word 'and' between paras (ii) and (iii) of the definition shows that the criteria are cumulative. The tailings satisfy paras (i) and (ii). Para (iii) requires that the discharge or depositing of the tailings take place 'in a manner that may detrimentally impact on the environment'. If the tailings are being discharged into the mined-out areas in the intertidal zone in accordance with the EMP, it does not seem plausible to say that they are being discharged in a manner that may detrimentally impact on the environment. On the contrary, the discharge of the tailings into the intertidal zone is intended to restore the beach to its natural state. If the tailings are being pumped directly into the sea, this may contravene the EMP but it is difficult to see how it is an action that could detrimentally affect the environment. The dumping of tailings on the beach further inland from the high-water mark might be detrimental to the environment but would not constitute 'dumping at sea'. The evidence before the Magistrate did not come close to raising a suspicion that the tailings were being discharged into the intertidal zone or sea in a manner that detrimentally affected the environment.

[155] However para (a) of the definition of 'dumping at sea' refers to the disposal into the sea of any waste 'or material'. The offence in s 79(1)(e) likewise refers to

the dumping of waste ‘or other material’ at sea. Contrary to MSR’s argument, I see no escape from the conclusion that the tailings constitute ‘other material’, particularly when regard is had to s 71(3) which takes for granted that ‘dredged material’ and ‘inert, inorganic geological material’ may fall within the definition of ‘waste or other material’.

[156] This takes one to the question whether the tailings, being ‘other material’, are being ‘dumped at sea’. The only potentially applicable paragraph of the definition of ‘dumping at sea’ is para (a). The concluding part of this paragraph (‘from a vessel…’) applies only to ‘operational waste’ (itself a defined term), as is apparent from the proviso at the end of the definition of ‘dumping at sea’. Despite the formatting of the proviso (‘but “dumping at sea” does not include… ‘), the proviso applies to the whole of what goes before, not only to para (d). Again this is clear from the content of the proviso.

[157] Proviso (iii) does not apply to MSR because its processing does not occur offshore. Proviso (i) could arguably apply. The expression ‘sea out-fall pipeline’ is not defined. The expression could arguably cover the pipeline through which MSR pumps tailings to the intertidal zone. The use of such a pipeline arguably became lawful as from 15 April 2015. Proviso (ii) might well apply. It is fairly arguable that the tailings are not returned to the mined-out area for the sole purpose of disposal. They are specifically returned to that area to rehabilitate the beach. If nothing other than disposal were involved, MSR might find it more convenient to dispose of the tailings elsewhere. (Different considerations might apply if the tailings were being pumped directly into the ocean without regard to the rehabilitation of the beach.)

[158] The above analysis would tend to support a conclusion that in law no ‘dumping at sea’ has occurred. However, and because the precise facts alleged by the DEA are unclear, it is preferable that I express no final opinion on this question.

<u>The jetty charge, increased footprint charge and road charge</u>

[159] Since I have found that the national inspectors did not have the mandate to apply for a search warrant in respect of these charges, it is not strictly necessary to

consider MSR's complaint of non-disclosure relating to them but I shall do so in case another court should disagree with my conclusion on the mandate attack.

DMR's letter of 21 April 2015

[160] In respect of all three charges, MSR says that the DEA should have disclosed to the Magistrate that, following an inspection by mineral inspectors on 20 May 2015, the DMR notified MSR on 21 May 2015 that the activities in question were lawful. (In fact, the DMR's letter dealt only with the jetty and increased footprint.) MSR also complains that the DEA failed to disclose that the increased footprint and road were approved by the DMR on 14 April 2015 as part of the amended Mining EMP.

[161] In her letter of 21 May 2015, the DMR's Ms Kunene expressed the view that MSR's environmental authorisation of 25 July 2012 entitled MSR to do anything falling within the limits of the promulgated listed activities which triggered the need for an environmental authorisation. One of the promulgated listed activities was construction or earthmoving activities in the sea in respect inter alia of fixed jetties, embankments and stabilising walls. Another of the promulgated listed activities was the development of an area of 20 ha or more. Ms Kunene's view was that the environmental authorisation entitled MSR to construct jetties and sea walls at will and to develop up to 20 ha at will.

[162] Ms Kunene's view is wrong. In the first part of the environmental authorisation letter the DPWC quoted the promulgated listed activities relevant to MSR's proposed operations. The letter then set out the operations of MSR which triggered the need for authorisation. It was this setting out of the operations, read together with the EMP (which MSR was obliged to implement as a condition of the authorisation), which determined what MSR was authorised to do.

[163] In my opinion, Ms Kunene's view was so patently wrong that the letter did not constitute a material fact which needed to be disclosed to the Magistrate. MSR's counsel did not seek to persuade me that Ms Kunene's view was defensible. Despite a faint suggestion to the contrary from MSR, Ms Kunene's expression of

opinion is not an administrative action having legal effect until set aside. She was not exercising a statutory power to issue rulings.

The DMR's approval of amended Mining EMP

[164] The amended Mining EMP approved by the DMR on 14 April 2015 authorised inter alia the increased footprint and the construction and widening of roads. MSR complains that the DEA failed to disclose this to the Magistrate. Although Ms Meissenheimer mentioned that the DMR approved an EMP on 14 April 2015, she did not disclose that the amended EMP dealt with, and purportedly legitimised, two of the five contraventions asserted by Ms Meissenheimer. (The amended Mining EMP did not mention the jetty and its approval could thus not have legitimised it.)

[165] This alleged non-disclosure requires a brief consideration of the legal effect of the DMR's approval of 14 April 2015. MSR contended, and the respondents' counsel accepted, that, by virtue of the transitional provisions in s 12(7) of Act 62 of 2008 read with regulation 54 of the 2014 EIA Regulations, the DMR was empowered to determine MSR's pending application for an amendment of its Mining EMP despite the repeal of s 39 of the Mining Act. I am somewhat doubtful that the transitional provisions had this effect[11] but for present purposes I shall assume it is correct.

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[11] **[A]** By 14 April 2015 s 39(6) of the Mining Act had been repealed. Unless s 39 remained in force by virtue of transitional arrangements, the DMR had no statutory power to approve an amended Mining EMP. The DMR, having become the competent authority as from 8 December 2014, had the statutory power to approve an amended NEMA EMP in terms of s 24N of NEMA read with regulation 37 the 2014 EIA Regulations but that is not a power which the DMR purported to exercise. The effect of s 12(4) of Act 62 of 2008 is that MSR's amended Mining EMP of 9 June 2011, being a Mining EMP in force as at 8 December 2014, was deemed to be a NEMA EMP approved in terms of s 24N of NEMA. On the face of it, therefore, one would expect that any amendment of the EMP after 8 December 2014 should take place in accordance with NEMA and the 2014 EIA Regulations. **[B]** Section 12(7) of Act 62 of 2008 applies to an 'application for a right or permit in relation to prospecting, exploration, mining or production' in terms of the Mining Act. An application to amend a Mining EMP is not an application for a right or permit as contemplated in s 12(7). It is a programme for managing the impacts of mining and is a prelude to the grant of a right or permit. The Mining Act contains many provisions relating to applications for rights, permits and permissions. The Mining Act does not use the language of 'right' or 'permit' in relation to EMPs. If s 12(7) applied to an application to amend a Mining EMP, I would have expected a further provision, along the lines of s 12(4), to the effect that an amended Mining EMP approved pursuant to s 12(7) would be deemed to be a NEMA EMP. **[C]** Of course, if there was a pending application for a mining right as at 8 December 2014, the finalisation of that application with reference to the unamended provisions of the Mining Act would entail inter alia that the Mining Minister could approve a Mining EMP in terms of s 39 as part of the process of granting the mining right. But if as at 8 December 2014 a company already held a mining

[166] Mr Paschke's main submission was that the amended Mining EMP, assuming it to be a deemed NEMA EMP, was insufficient to legitimise MSR's activities. He argued that MSR required an amended or additional environmental authorisation in terms of NEMA in order to construct the jetty, construct roads and extend the SCP site. Although the Mining Minister may have become the competent authority to grant the environmental authorisation, the DMR's approval of the amended Mining EMP did not simultaneously constitute an environmental authorisation. Para 20 of the DMR's approval letter of 14 April 2015 expressly stated that any NEMA listed activities required approval from the competent authority before commencement. The process for obtaining an environmental authorisation is more rigorous than for an amendment of a Mining EMP. The DMR may well have assumed that, in terms of the relevant transitional provisions, MSR was following a parallel process to obtain an amendment of its environmental authorisation. Indeed, the DMR was told in the amended mining EMP that MSR required an environmental authorisation in terms of NEMA which would be finalised with the DPWC in the near future.[12]

[167] Mr Paschke also submitted that, because MSR had unlawfully embarked on the activities in question without first obtaining the requisite environmental

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right and was simply applying to amend the EMP, there would be no application for a right or permit and s 12(7) would thus not operate. **[D]** What then is one to make of the curious regulation 54 of the 2014 EIA Regulations? There can be no doubt that the framer of regulation 54 intended that its provisions should apply inter alia to pending applications for the amendment of Mining EMPs. The regulation has not been attacked as ultra vires. Nevertheless it is difficult to see how regulation 54 could have any legal effect in relation to pending applications to amend Mining EMPs. The transitional provision in regulation 54 is that pending applications submitted in terms of the Mining Regulations should be dealt with as if the Mining Regulations were not repealed. Apart from the fact that the Mining Regulations have not been repealed, they did not deal with applications to amend Mining EMPs. Those were regulated directly by s 36(9) read with s 102 of the Mining Act. Accordingly, the deemed continuance of the Mining Regulations could have no legal effect on pending applications to amend Mining EMPs. How such pending applications were to be dealt with depends on the transitional provisions relating to the Mining Act. For reasons I have explained, s 12(7) of Act 62 of 2008 does not seem to me to apply to pending applications to amend mining EMPs. **[E]** If this view is correct, the DMR acted without statutory foundation when it purported to approve the amended Mining EMP on 14 April 2015. It might be said that the approval nevertheless stands until set aside on review. While that is no doubt the general principle, where would it take MSR in the present case? If MSR requires approval of an amended EMP in terms of s 24N of NEMA read with the 2014 EIA Regulations in order to legitimise its departures from the previous Mining EMP, the amended Mining EMP purportedly approved in terms of the repealed s 39(6) is irrelevant since there is no law which says that the amended Mining EMP is deemed to constitute an amended NEMA EMP. The DMR's decision to approve the amended Mining EMP might technically stand until set aside but it is a decision without legal consequence.

[12] p 714.

authorisation, the process for obtaining ex post facto approval was the one set out in s 24G rather than s 24.

[168] The construction of the jetty (or groyne) falls within activity 17 of the Listing Notice 1 of 2014. The clearing of more than 1 ha of indigenous vegetation falls within activity 27 of the said Listing Notice 1. The development of a road wider than 4 m with a reserve less than 13,5 m is activity 4 in Listing Notice 3 of 2014.

[169] I have already explained why I regard Ms Kunene's view in her letter of 21 May 2015 to be wrong. Although MSR's environmental authorisation of 25 July 2012 was triggered because it was undertaking, inter alia, activities falling within the scope of previous versions of listed activities similar in scope to activities 17 and 27 of Listing Notice 1 of 2014, the authorisation did not permit MSR to do whatever it liked within the scope of the promulgated listed activities. A person who applies for an environmental authorisation to clear 2 ha of indigenous vegetation self-evidently cannot proceed to clear 20 ha of indigenous vegetation without obtaining a further environmental authorisation. A person who has been authorised to construct one road wider than 4 m self-evidently cannot proceed to develop five such roads.

[170] In terms of NEMA, both an environmental authorisation and an EMP may be amended. I was not fully addressed on the question as to when an amendment of an EMP will suffice but it seems to me that the answer must lie in a proper appreciation of the function of an EMP and of the reason for the more rigorous processes required for environmental authorisations. In terms of s 24N, the main function of an EMP is to provide information on the proposed management, mitigation, protection and remedial measures that will be undertaken to address the environmental impacts of the activities to be undertaken. Although the EMP would identify the activities to be undertaken in order to provide the context for the measures proposed, it is not the function of the EMP to determine the activities which the applicant is authorised to undertake. That must be determined with reference to the environmental authorisation read with the application. Of course, one would expect the EMP accurately to set out the scope of the activities for which the applicant is seeking authorisation since otherwise the EMP would not properly

be addressing the activities to be undertaken but this does not mean that it is the EMP itself which constitutes the environmental authorisation.

[171] The accurate definition of the scope of the activities for which the applicant is seeking authorisation is important if the impacts of the activities are to be properly assessed in accordance with the EIA Regulations. Self-evidently, the impact of clearing 20 ha of indigenous vegetation will be greater than clearing 2 ha and so forth.

[172] MSR's counsel did not argue that, in terms of the legislative regime prevailing prior to 8 December 2014 (which may have remained in force in respect of pending matters), the obtaining of approvals under the Mining Act made it unnecessary for MSR to obtain environmental authorisation in terms of NEMA for any listed activities which the mining company would be undertaking. That any such suggestion would be unsound is clear from the judgment of the Constitutional Court in *Maccsand (Pty) Ltd v City of Cape Town & Others* 2012 (4) SA 181 (CC).

[173] It follows that, if MSR has undertaken listed activity beyond the scope of the activities for which it obtained authorisation in 2012, it required an amended or additional environmental authorisation. And to the extent that it has undertaken those activities without obtaining environmental authorisation, the process it would need to follow is that laid down in s 24G rather than s 24.

[174] Insofar as the jetty charge is concerned, MSR's environmental authorisation permitted the excavation of sand in the intertidal zone. To facilitate such excavation, MSR was authorised to construct temporary sea walls using beach sand from the area to be mined. The purpose of the sea walls (or berms) was to prevent the mining pit from being flooded. The sea walls were to be flattened by the excavators after the area had been mined. This appears from the authorisation letter and more fully from the EMP.

[175] The text and photographs in the FT document show that the jetty has been constructed with boulders. According to the FT document (again supported by photographs), MSR has trucked the boulders to Tormin from a decommissioned

mine about 70 km away. The FT document states that the purpose of the jetty is unclear. To my eye, it is not part of a structure to prevent the ocean from entering a mining pit. MSR's environmental authorisation and EMP did not authorise a structure made from boulders or a structure for a purpose other than temporarily protecting a mining pit.

[176] In my view, therefore, MSR required a further environmental authorisation to construct the jetty. In any event, the amended Mining EMP approved on 14 April 2015 did not purport to authorise the construction of the jetty.

[177] Insofar as the expanded footprint charge is concerned, the environmental authorisation does not specify the dimensions of the SCP site. However there is no reason to doubt that the authorisation which MSR sought was consistent with the description of its activities in the EMP. The EMP provided that the SCP and supporting infrastructure and facilities would be in a fenced-off area covering 2,72 ha.[13] Because the SCP site became congested when the PBCs were moved there and when the GSPs were installed, MSR began to expand the site. The expansion of the site is apparent from photographs included in the FT document and in the Google Earth images forming part of Ms Meissenheimer's affidavit. The amended Mining EMP sought approval for an expansion of an additional 7,18 ha.[14] The inspection by the provincial inspectors on 24 February 2015 established that by that date the SCP site had already been expanded by 3,8 ha.

[178] In my view, the clearing of the vegetation around the original SCP site, to the extent that it exceeded 1 ha, required a further environmental authorisation. The approval of the amended Mining EMP did not on its own suffice.

[179] In regard to the road charge, the construction and widening of roads was not a listed activity for which MSR needed environmental authorisation in 2012. The environmental authorisation recorded that MSR would be using an existing gravel farm road for access to the mine and existing internal access roads for access to the

[13] 160 m x 170 m [p 486 and p 519].
[14] p 685.

beach. These roads could be upgraded to improve their condition and were to undergo routine maintenance.

[180] There can thus be no doubt that MSR required an environmental authorisation if any of the road construction or road widening which it later undertook fell within the scope of the listed activities. Whether MSR did in fact undertake road construction or road widening within the scope of the listed activities is something I shall consider separately under a later heading.

[181] I think this analysis of the need for amended or additional environmental authorisations is sufficiently straightforward that it was unnecessary for the DEA to disclose to the Magistrate that the amended Mining EMP approved on 14 April 2015 accommodated the expanded SCP site and the expansion of roads, particularly when the DMR's approval letter specifically stated that the approval of the amended EMP did not exempt MSR from obtaining any necessary environmental authorisations. There was no plausible case to be made that the approval of the amended Mining EMP in itself legitimised the activities in question prospectively.

[182] It is thus unnecessary to consider the further question whether, if the amended Mining EMP legitimised the activities in question prospectively, the non-disclosure of the terms of the amended Mining EMP was material, having regard to the fact that MSR would still reasonably be suspected of having committed offences by embarking on those activities prior to 14 April 2015.

The jetty and expanded footprint charges – reasonable grounds for suspicion

[183] What I have said in the previous section of this judgment suffices to deal with MSR's contention that the DEA's application did not establish reasonable grounds for suspecting that MSR had perpetrated and was perpetrating the jetty and expanded footprint offences.

The road charge – reasonable grounds for suspicion

[184] The arguments in respect of this charge went beyond the alleged non-disclosure, focusing also on whether the material before the Magistrate established reasonable grounds for suspecting that the offence in question had been or was being committed. To some extent, and as will appear, this is related to MSR's hearsay complaint. Since the adequacy of the material before the Magistrate is a legal question, I think it is open to MSR to argue the point. Once again, the respondents dealt fully with it in their heads of argument.[15]

[185] As I have mentioned, the construction of roads was not a listed activity for which MSR needed or obtained environmental authorisation in 2012 because it was going to use existing roads.

[186] The road charge was stated by Ms Meissenheimer to be based on the alleged construction of a road wider than 4 m with a reserve of less than 13,5 m (activity 4 in Listing Notice 3 of 2014). Because MSR did not have environmental authorisation for this listed activity, MSR was said to have contravened s 49A(1)(a) of NEMA.

[187] There were no photographs or text in Ms Meissenheimer's affidavit to support this assertion. Mr Dlulane said nothing about the construction of a road. He merely repeated, as one of the previous complaints recorded in the FT document, the alleged unauthorized use of (existing) roads.

[188] The text of the FT document says nothing about the construction of a new road. The only reference to a new road is in the images of unidentified provenance which were attached to Ms Meissenheimer's affidavit after the FT document. Although I have rejected MSR's hearsay complaint in regard to the FT document, it is a stretch too far to treat these unidentified photographs as probative material before the Magistrate.

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[15] Paras 186-192 of the main heads and sheet 3.5 of the 'mind map'.

[189] If the unidentified photographs and their captions are rejected as having probative value, there was nothing before the Magistrate to support the assertion that MSR had constructed a new road wider than 4 m. If I am wrong in treating the unidentified photographs as inadmissible, the only relevant photographs are at pages 34 and 35 of the rule 53 record. Page 35 consists of two images beneath the caption 'Haul Road Expansion'. The alleged expansion is highlighted in red. Page 36 contains a single image beneath the caption 'Unapproved Haul Road Expansion'. There is a road highlighted in green with the caption 'approved haul road' and another road highlighted in red with the caption 'new haul road not approved'.

[190] The road expansion supposedly shown at page 34 is not the construction of a new road but the alleged widening of an existing road. Ms Meissenheimer's allegation, however, was not one of an unlawful widening of a road but the unlawful construction of a road. The widening of an existing road by more than 4 m is a separate listed activity in Listing Notice 3 but that was not the charge. In any event, Mr Paschke realistically acknowledged that one cannot tell, from the images on page 34, that an existing road has been widened (there are no 'before' and 'after' images) or, if it has, that it has been widened by more than 4 m. In MSR's application to amend its Mining EMP, MSR stated that that the existing haul road was 8 m wide, which posed safety issues due to the size of the haul trucks. MSR said it was imperative for the road to be widened. It was recorded that the DMR itself had requested the widening of the road to 12 m.[16] This was subsequently approved by the DMR on 14 April 2015. It will be recalled that during their inspection of 24 February 2015 the provincial inspectors ascertained that a road had been widened by 4 m. Accordingly, and even if one goes beyond the material which was before the Magistrate, it is by no means apparent that MSR widened the road by more than 4 m.

[191] In regard to the new haul road supposedly depicted at page 35, one cannot tell, just by looking at the photograph, that the road in question is wider than 4 m. The caption to the photograph does not say so.

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[16] Record 737-738.

[192] In my view, therefore, the evidence before the Magistrate did not establish reasonable grounds for suspecting that MSR had committed the alleged offence of constructing a road wider than 4 m.

No need for a warrant

[193] MSR attacked the warrant on the ground that it was implicit in s 21 of the CPA that a warrant had to be necessary in the sense that it was reasonable for the investigator to seek a search warrant rather than employing other less invasive means (*Thint* para 126). A warrant was said to have been unnecessary because MSR was not refusing access to inspectors but merely challenging Mr Dlulane's mandate.

[194] I do not think that this criticism is sound. If Mr Dlulane and other national inspectors were in law entitled to conduct an inspection, it was no answer for MSR to say that, although the company refused to give access to national inspectors, it was willing to give access to mining inspectors. If the matter was within the national inspectors' mandate, they were not obliged to defer to the mining inspectors.

[195] Mr Paschke submitted that an ordinary NEMA inspection, whether by national inspectors or mining inspectors, would in any event not have been permissible because in terms of s 31K warrantless inspections are only permissible in the case of routine inspections. What the investigators wished to undertake in September 2016 was a targeted search. This contention is sound. The possible need to distinguish between routine regulatory inspections and targeted inspections was discussed in *Magajane v Chairperson, Northwest Gambling Board & Others* 2006 (5) SA 250 (CC), *Gaertner & Others v Minister of Finance & Others* 2014 (1) SA 442 (CC) and *Estate Agency Affairs Board v Auction Alliance (Pty) Ltd & Others* 2014 (3) SA 106 (CC) in the context of determining whether various statutory provisions were unconstitutional and in circumstances where the legislation itself did not draw the distinction. In the case of NEMA, s 31K in express terms refers to routine inspections. An inspection to search for evidence in support of suspected criminality is not a routine inspection.

[196] MSR's counsel submitted that a warrant was not needed because one was not dealing with evidence that could 'disappear' – the failed cliff, the roads, the expanded footprint. There are two answers to that submission. Firstly, the investigators needed access to the site to ascertain more precisely the dimensions and physical characteristics of these features. Second, there were documents which might be relevant to the suspected offences.

[197] During argument it was suggested that a warrant was not reasonably required because the physical features of the mining area could have been assessed aerially (by drones) or from the sea (in boats). Because this complaint was not raised in the founding papers, the respondents did not have the opportunity to explain why these other methods were not reasonable alternatives. In any event, the purpose of the search was not only to assess the physical features of the site but to investigate questions of timing and causation by examining documents. For example, in relation to the failing cliff charge it would not be unreasonable to believe that minutes and internal reports might record the process of collapse and link such collapse to operational events and mishaps.

[198] Insofar as the increased footprint charge is concerned, I must say that there appears to me to have been little justification for resorting to a search warrant. GCS told the provincial inspector, Ms Schippers, on 23 October 2014 that the SCP site had already been expanded by 1,3 ha. The provincial inspectors ascertained during their inspection of 24 February 2015 that the SCP site had been expanded by about 3.8 ha. The amended Mining EMP was approved on the basis that this expansion was necessary. It is difficult to know what more evidence the DEA needed to establish that the footprint had been expanded prior to the approval of the amended EMP. However, this was not one of the criticisms advanced by MSR.

The terms of the warrant

[199] MSR said that the warrant was not 'reasonably intelligible'. MSR submitted that the warrant had to be assessed as a self-standing document without reference to the affidavits placed before the Magistrate. This is generally correct (*Thint* paras

158-162 where Langa CJ distinguished between the permissible and impermissible use which could be made of extraneous material).

The first charge

[200] The first intelligibility complaint is that, in the warrant, the first charge (which we know was intended to be the failing cliff charge) mentioned a contravention of s 49A(1)(e) without any reference to the failure of the cliff. A warrant in terms of s 21 of the CPA must specify the offence under investigation (*Van der Merwe* supra paras 43-57). This forms part of the intelligibility principle. The ambit of the search authorised by a warrant cannot be properly ascertained without a reasonably intelligible identification of the offence under investigation. A lack of intelligibility as to the crime under investigation cannot be remedied by evidence showing that the subject of the search knew what it was all about (*Powell* paras 45-62).

[201] In *Van der Merwe* the warrant specified no offence at all. The same is true of *Powell* and the two early provincial decisions which were leading authorities on this point in the pre-constitutional era (*Herzfelder v Attorney-General* 1907 TS 403 and *Pullen NO, Bartman NO & Orr NO v Waja* 1929 TPD 838). Here the first offence was mentioned after a fashion. However s 49A(1)(e) can be contravened in an infinite variety of ways. Merely identifying the section would not tell the investigator or the target that what could legitimately be searched for were things connected with a suspected unlawful and culpable causing of a collapse of the cliff.

[202] Nevertheless it appears from *Thint* that identifying the statutory contravention suffices (para 168). In that case the warrant listed the suspected offences as corruption, fraud, money laundering and tax offences in contravention of various statutes without further particularity (see at 21H-22B where the relevant part of the warrant is quoted). Langa CJ said that ‘this broad description of the scope of the investigation’ was sufficient to satisfy the objective test of reasonable intelligibility (para 169). He added that the applicants were given a copy of the supporting affidavit the day after the search and would thus have been in a position to complain that any particular seized item fell beyond the objective scope of the search (para

171), this being a permissible use of extraneous material. In *Powell*, by contrast, the affidavit in support of the warrant was not made available to the target (para 60).

[203] Here the warrant specified the statutory provision allegedly contravened. Even if this, standing on its own, did not suffice, the warrant stipulated that the supporting affidavits had to be handed to any affected person together with the warrant. The supporting affidavits made it clear that the s 49A(1)(e) contravention related to the cliff failure. No other contravention of that provision was mentioned in the supporting affidavits. If the warrant had not mentioned s 49A(1)(e) at all, MSR would not have known that the Magistrate had authorised an investigation of a contravention of that section. The fact that such a contravention was mentioned in the supporting affidavits would not have taken the matter further. But where the Magistrate has mentioned a specific section, I think regard can be had to the supporting affidavits, which were to be delivered together with the warrant, for the purpose of identifying more specifically the contravention which the Magistrate had in mind.[17]

Electronic data

[204] The authority conferred by the warrant in regard to the searching and copying of electronic data was said to be partly incomprehensible. I need say no more than that I disagree and that in any event the investigators did not act on this part of the warrant.

[205] In argument MSR's counsel submitted that some of the other items which the investigator was authorised to search for suffered from overbreadth. Apart from the fact that these criticisms were not raised in the founding papers, I think it was reasonably obvious that documents of the broad kind stipulated could only be taken to the extent that they were connected with one or more of the five charges. The

[17] Mr Paschke, in support of an argument that I could have regard to the affidavits, referred me to the Canadian case of *R v Gladwin* [1997] OJ No 2479 (ONCA). The decision is not entirely in point, since there the court was concerned not with the validity of the warrant but with the question whether material seized pursuant to the warrant should be sent to the United States, a question which was regarded as being similar to the one which arises where, at a criminal trial, the court is asked to admit unlawfully seized evidence.

DEA would not have known in advance which precise documents would contain references relevant to the charges.

No named suspect

[206] There was a complaint that the warrant failed to name the suspected offender (cf *Van der Merwe* para 55(f)). This complaint lacks merit. It is clear from the warrant as a whole that the suspected offender was the person conducting the mining operations, ie MSR. And para 3 of Ms Meissenheimer's supporting affidavit placed this beyond doubt.

Warrant ultra vires in relation to photographs, measurements and samples

[207] The warrant authorised the investigators to take photographs, samples and measurements. MSR complained that this was outside the scope of s 21 of the CPA and thus ultra vires.

[208] A sample (eg a soil sample) is within the wide meaning of the word 'anything'. In regard to photographs and measurements, it would be strange if s 21 permitted the more extreme invasion of physically removing a corporeal object while prohibiting the less extreme invasion of simply ascertaining the characteristics of the object in situ by measuring and photographing it, particularly where the object is not capable of being physically removed (eg a failed cliff, a road). It would seem to be a case of the greater including the lesser.[18] Although Mr Hodes initially supported this complaint in argument, I understood him on reflection to accept that the measuring and photographing of physical features must be within the scope of s 21.

Magistrate's failure to apply his mind?

[209] In their heads of argument MSR's counsel submitted that, in view of the limited time the Magistrate had to consider the application and his failure to provide reasons in response to the review application, one could conclude that he had failed

[18] Cf *Sebola & Another v Standard Bank of South Africa Ltd & Another* 2012 (5) SA 142 (CC) para 68.

to exercise his discretion judicially in issuing the warrant. This is a factual question. MSR did not allege that the Magistrate failed to apply his mind properly to the matter. The Magistrate was not called upon to respond to such criticism. I thus do not think that this line of argument is open to MSR.

The execution of the warrant

[210] The execution of the warrant was attacked on the basis of the participation of unauthorized officials. I have already dealt with the facts. There is no substance in the complaint, even though the use of such a large contingent was rather heavy-handed. The one unnamed police officer who accompanied the search team did not participate in the search. In any event a search is not rendered unlawful because a person not named in the warrant assists the named officer provided the named officer remains in control of the operation (*Goqwana v Minister of Safety and Security & Others* 2016 (1) SACR 384 (SCA) para 25; cf *R v Strachan* 1988 CanLII 25 (SCC) paras 23-29).

The declaratory relief

[211] MSR's counsel said that, if I were to decide the mandate question in the context of the validity of the warrant, MSR did not press for a declaratory order. The declaratory relief was intended to resolve the mandate question if the court should set aside the warrant on other grounds.

[212] In the circumstances it is unnecessary to say anything more about the declaratory relief claimed (which was admittedly overbroad) or the conditional counter-application which it prompted.

Summary thus far

[213] It is convenient to summarise the conclusions I have reached:

(a) The warrant is invalid, insofar as it relates to the jetty charge, the increased footprint charge and the road charge, because the investigation of those charges was not within the mandate of the national inspectors.

(b) The warrant is invalid, insofar as it relates to the above three charges and the failing cliff charge, because the DEA failed to disclose the legislative changes of 8 December 2014 and MSR's position on the mandate issue.

(c) The warrant is invalid, insofar as it relates to the dumping charge, because the evidence presented to the Magistrate was too confusing and unclear to constitute reasonable grounds for suspecting that the dumping offence was being or had been committed.

(d) The warrant is invalid, insofar as it relates to the road charge, because the admissible evidence presented to the Magistrate did not establish reasonable grounds for suspecting that the road offence was being or had been committed.

(e) Were it not for the finding in (a), I would not have set aside the warrant in relation to the jetty charge, ie I do not think the other attacks on the warrant in respect of this charge are sound.

(f) Were it not for the finding in (b), I would not have set aside the warrant in relation to the failing cliff charge, ie I do not think that the other attacks on the warrant in respect of this charge are sound.

(g) But for the cumulative findings set out above, I would not have set aside the warrant as lacking intelligibility or for failing to identify the suspected offender or as being partially ultra vires.

(h) But for the cumulative findings set out above, I would not have declared the execution of the warrant unlawful.

Preservation of seized material

[214] The respondents contended that, if I should find the warrant or its execution to be unlawful, I should grant an order preserving the seized material and evidence pending further developments. In their heads of argument the respondents' counsel submitted that preliminary litigation on search warrants is generally undesirable and should not be entertained, adding that in practice the courts discourage this type of preliminary litigation by granting preservation orders even if the application succeeds.

[215] I did not understand Mr Paschke to press for the dismissal of the application as constituting inappropriate preliminary litigation. As Langa CJ observed in *Thint* para 65, there is no absolute rule. He said that if a warrant is clearly unlawful, the victim should be able to have it set aside promptly. If the trial is only likely to commence far in the future, the victim should be able to engage in preliminary litigation to enforce its fundamental rights. The litigation which the courts should not entertain is litigation having as its purpose to avoid the application of s 35(5) of the Constitution or to delay criminal proceedings. That is not the case here. MSR has not yet been charged. No criminal trial is imminent. MSR has raised points of substance. The issue regarding the inspectors' mandates required resolution in any event.

[216] Mr Paschke did argue, however, that I should grant a preservation order. In *Thint* paras 216-223 Langa CJ analysed the legal foundation for such orders. He held that the court's authority to make a preservation order is sourced in s 172(1)(b) of the Constitution. He considered that preservation orders of the kind proposed in the minority judgment in *Thint* in the Supreme Court of Appeal[19] and in para 34 of the majority judgment in *National Director Of Public Prosecutions & Another v Mohamed* 2008 (1) SACR 309 (SCA) would frequently be a just and equitable remedy. Importantly, he held that the 'ordinary rule' should be that, when a court finds a warrant to be unlawful, it will preserve the evidence so that the trial court can apply its discretion in terms of s 35(5) of the Constitution in deciding whether or not the unlawfully obtained evidence should be admitted. A court should only depart from this ordinary rule if the applicant can identify specific items the seizure of which constituted a serious breach of privacy that affected the 'inner core of the personal or intimate sphere' or where there was 'particularly egregious conduct in the execution of the warrant'.

[217] As appears from the preservation orders made or proposed in the judgments referred to by Langa CJ, a preservation order does not have as its sole purpose to preserve the evidence for possible use at the trial pursuant to s 35(5) of the Constitution. The order also takes into account that the evidence might lawfully be

[19] 2008 (1) SACR 258 (SCA) para 70.

seized in the future pursuant to a process not vitiated by the errors which rendered the first warrant unlawful.

[218] Although the cases discussed above dealt with s 29 of the National Prosecuting Authority Act 32 of 1998, similar considerations apply to s 21 of the CPA (see *Van den Berg & Another v Page & Others* [2016] ZAWCHC 82 para 11).

[219] In the present case there are no special circumstances justifying a departure from the 'ordinary rule'. MSR, as a company operating in a regulated activity, does not have an inner core of personal and intimate space. There was no egregious conduct in the execution of the warrant. Apart from the fact that a trial court might find the seized material to be admissible in terms of s 35(5) of the Constitution, it is quite plausible that a fresh warrant may be obtained pursuant to a lawful process. A national inspector could seek a warrant in respect of the failing cliff charge and (if it is thought to be sustainable) the dumping charge. A mining inspector or a police official (whose mandate is in no way restricted by the provisions of NEMA) could seek a warrant in respect of the jetty charge, the increased footprint charge and the road charge.

[220] Based on the fuller information contained in the affidavits before me, the charges cannot be said to lack substance. Even if some aspects of MSR's conduct became lawful as from 14 April 2015 (which I doubt), the DRM's decision of that date did not retrospectively legitimise the activities in question. If MSR took matters into its own hands and only sought the necessary approvals after the event, such conduct is to be strongly deprecated. If the failure of the cliff was caused or exacerbated by MSR's unauthorized decision to move the PBCs to the SCP site in late 2013, that is a very serious matter.

[221] The preservation order I intend to make will take into account that the original documents have been returned to MSR and that the investigators did not seize or copy any electronic data. The order proposed by Farlam JA in *Thint* imposed restrictions not only in respect of retained copies but in respect of originals returned to the searched person. I assume that this was for the reason that the investigators only became aware of the documents in question (ie of the originals returned to the

searched person) by virtue of the unlawful warrant. However I am disinclined in the present case to afford MSR special protection in relation to the original documents returned to MSR. They are business records which MSR could be expected to keep. The fact of their existence is not surprising.

Conclusion

[222] MSR has achieved substantial success. The respondents must thus pay MSR's costs, including those attendant on the employment of two counsel.

[223] The respondents applied at a late stage for leave to file further affidavits. These affidavits were not lengthy. MSR replied to them. Although the material is of dubious relevance, it was placed before me and reference was made to it in argument. Little point would be served in dismissing the application for leave to adduce the late affidavits.

[224] I make the following order:

(a) The application by the second, fourth, fifth, sixth and seventh respondents, served on 31 January 2017, for leave to file further affidavits is granted.

(b) The decision of the first respondent, taken on 28 September 2016, to issue a search and seizure warrant in terms of s 21 of the Criminal Procedure Act 51 of 1977 in Case 78/2016, a copy of which warrant is attached to the founding affidavit as annexure "SPM12", is reviewed and set aside.

(c) The said warrant is declared to be invalid and is set aside.

(d) The second, fifth, sixth and seventh respondents must, within two weeks of this order, cause one copy of all the documents, photographs, measurements and other evidence seized or taken during the execution of the warrant on 29 September 2016 ('the retained items'), together with a detailed itemised index thereof, to be delivered to the registrar, who is directed to keep same intact under seal until:

(i) the said respondents notify the registrar in writing that the retained items or any of them may be returned to the applicant;

(ii) if proceedings are instituted in respect of the charges identified in the warrant as read with the affidavits made in support thereof, the conclusion of such proceedings;

(iii) the date upon which the National Prosecuting Authority decides not to institute, or decides to abandon, such proceedings.

(e) Simultaneously with delivery to the registrar in terms of (d), the said respondents must:

(i) cause one copy of the retained items together with the index to be delivered to the applicant's attorneys;

(ii) deliver an affidavit, by a person with personal knowledge thereof, confirming that all other copies of the retained items have been destroyed.

(f) The provisions of (d) are subject to:

(i) any order of any competent court (whether obtained by the applicant or by the respondents);

(ii) the lawful execution of any search warrant obtained in the future; or

(iii) the duty of the applicant or the registrar to comply with any lawful subpoena issued in the future.

(g) Neither the respondents nor inspectors appointed by them may take any steps to obtain access to any of the retained items unless they give the applicant reasonable prior notice before any such step is taken.

(h) No order is made in respect of para 7 of Part B of the applicant's notice of motion (the prayer for declaratory relief) or on the conditional counter-application delivered by the second, fifth, sixth and seventh respondents.

(i) The second, fifth, sixth and seventh respondents jointly and severally are directed to pay the applicant's costs, including those attendant on the employment of two counsel.

ROGERS J

APPEARANCES

For Applicant	Mr PB Hodes SC & Mr HJ de Waal Instructed by Hogan Lovells (South Africa) Inc 22 Fredman Drive Sandton
For 2nd, 5th, 6th & 7th Respondents	Mr R Paschke, Mr T Sidaki and Ms J Bleazard Instructed by The State Attorney 22 Long Street Cape Town