



Mining and Ecotourism: *Mining and Environmental Justice Community Network of South Africa and Others v Minister of Environmental Affairs and Others: An Analysis*

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Abstract

In the recent case of *Mining and Environmental Justice Community Network of South Africa and Others v Minister of Environmental Affairs and Others* [2019] 1 All SA 491 (GP) the High Court of South Africa decided on a case brought by a coalition of eight civil society organisations. The Applicants challenged several authorisations, which led to the permission of an underground coal mine in the Mabola Protected Environment. The Mabola Protected Environment is located within southern Mpumalanga and is recognised as the site of some of the most sensitive and unique biodiversity in the country. The area is also a critically important and high yielding water catchment. The Mabola Protected Environment was declared on 22 January 2014 with the vision of developing the area for ecotourism development. Against this background, the aim of this paper is to analyse the judgement of the court in *Mining and Environmental Justice Community Network of South Africa and Others v Minister of Environmental Affairs and Others* and to locate its significance in the context of ecotourism. It will be argued that protected areas not only help protect our biodiversity, particularly our incredible wildlife and important natural ecosystems, but are also a key part of South Africa's reputation as a global ecotourism destination. It is thus, crucial that government, as custodian of protected environments, effectively and diligently performs its crucial role of ensuring that declared protected environments are protected. The researcher concludes by submitting that ecotourism should be promoted in protected areas renowned for among others, their outstanding beauty and extraordinary ecological interest and that government should devise ways of returning the benefits to the local communities while supporting the protection of protected areas.

Keywords: ecotourism, environment, mining, protected areas, sustainability, South Africa.

Introduction

The mining sector has historically been the backbone of South Africa's economy (CALs, 2017) as much of the country's wealth was acquired from the abundance of the mineral resources (CSIR, 2013). To quite a significant extent, as will be highlighted, mining still continues to play a crucial role in the development in the country. However, despite the economic growth arising from mining, a matter of concern in this paper is the impact of mining in protected areas on ecotourism. South Africa's key strategic documents have recognized the tourism sector's potential to bring about economic growth and employment creation in the country. The National Development Plan (NDP), an economic policy framework for the country which aims to eliminate poverty and reduce inequality by 2030, recognizes tourism as a key driver of employment, economic growth and the national transformation agenda (NDP, 2012). South Africa's New Growth Path: Framework 2011, which aims to create 5-million jobs and reduce unemployment over the next 10 years in South



Africa, has identified tourism as one of the areas expected to contribute significantly to the growth of the economy, job creation and the development of rural areas within the country (Economic Development Department, 2011). With regard to unemployment, it is noteworthy that according to Statistics South Africa (Stats SA) the unemployment rate is currently at 29% in the second quarter of 2019 (Stats SA, Quarterly Labour Force Survey - Quarter 2: 2019). However, while tourism has the potential to among others, lead to job creation and economic development, it will be argued in this paper that mining poses challenges for ecotourism, particularly in situations where mining is allowed to take place in protected areas.

Research Methodology

The research method that has been used in this study is qualitative. According to Astalin, “qualitative research is a systematic scientific inquiry which seeks to build a holistic, largely narrative, description to inform the researcher’s understanding of a social or cultural phenomenon” (Astalin, 2013). Hancock, Ockleford and Windridge states that, “qualitative research is concerned with developing explanations of social phenomena” (Hancock, Ockleford & Windridge 2009). Flick defines qualitative research as “a form of systematic empirical inquiry into meaning” (Flick, 2002). Thus, qualitative research is intended to penetrate to the deeper significance of the topic being researched (Mason, 2018). While there are a number of methods that can be categorized as qualitative research, “the main methods associated with qualitative research are ethnography/participant observation, qualitative interviewing, focus groups and the collection and qualitative analysis of texts and documents” (Mills & Berks , 2014). The method that has been used in this study involves collecting and analysing qualitatively, documentations. In particular, reported case law, legislation, journal articles, books and online sources were analysed. Thus, essentially, the study utilized extensive relevant literature and in particular the case of *Mining and Environmental Justice Community Network of South Africa and others v Minister of Environmental Affairs and others*. The analytical approach was used to acquire a better understanding of the issues under discussion while the critical approach was employed to challenge the status quo. In the following discussion, the factual background of the case of *Mining and Environmental Justice Community Network of South Africa and others v Minister of Environmental Affairs and others* is provided.

The factual background

The applicants challenged the authorisations’ granted by the Minister of Environmental Affairs and the Minister of Mineral Resources to permit coal mining activities in the Mabola Protected Environment. The Mabola Protected Environment is a protected wetlands and grasslands area, which have been largely classified as "Irreplaceable Critical Biodiversity Areas" and "Optimal Critical Biodiversity Areas." The authorisations’ by the Ministers’ in issue included, (i) mining rights granted by the Minister of Mineral Resources; (ii) the approval of an environmental management programme for the mine by the Department of Mineral Resources; (iii) environmental authorisation for the mine in terms of the National Environment Management Act 107 of 1998 (hereinafter, referred to as the NEMA) by the Mpumalanga Department of Agriculture, Rural Development and Environmental Affairs; (iv) the granting of a water use licence in terms of the National Water Act 36 of 1998 (hereinafter, referred to as the NWA) by the Department of Water and Sanitation; and (v) the granting of permission to mine within a protected environment. Of extreme importance and arguably, the most crucial of all was the permission granted in terms of section 48 of the National Environmental Management: Protected Areas Act 57 of 2003 (hereafter referred to as the NEMPAA) to mine within a protected environment. This section prohibits mining in a protected environment, even if other statutory authorisations’ are in place. However, it also creates an



exception, if the minister responsible for the environment and the minister responsible for mining both grant written permission for commercial mining to take place within the protected environment. In this case, the exception was made and permission to mine in a protected was granted by both the Minister of Environmental Affairs and the Minister of Mineral Resources. It is this permission for mining to take place in the Mabola Protected Environment, which was the subject of judicial review brought by the coalition. The Applicants sought to have the decision of the Minister of Environmental Affairs and the Minister of Mineral Resources to permit coal mining activities by Atha-Africa Ventures Proprietary Limited in the Mabola Protected Environment reviewed and set aside. The applicants relied on a number of grounds for review, the principal of which are Ministers' failure to observe the provisions of sections 3 and 4 of the Promotion of Administrative Justice Act No 3 of 2000 (hereinafter, PAJA). Section 3 provides provisions for procedurally fair administrative action affecting any person while section 4 focuses on administrative action affecting the public. The applicants argued, amongst other things that there was a lack of transparency as the decisions were made in secrecy and without any consultations with the interested parties, including the local communities.

The Ministers' conceded noncompliance with section 3 and 4 of PAJA but contended that they were justified in departing from these provisions. The applicants also argued that there was a lack of transparency as the decisions by the Ministers were made in secrecy and without any consultations with the interested parties, including the local communities. Consequently, the Ministers had also acted in breach of section 48(4) of NEMPAA which requires Ministers when applying section 48, to "take into account the interests of local communities and the environmental principles referred to in section 2 of the NEMA." The NEMA provides for a set of principles to be applied throughout the Republic by organs of state when taking decision which may significantly affect the environment. The NEMA also prescribes a number of relevant considerations to be considered when sustainable development is considered as part of integrated environment management (section 2). Of importance is section 2(4)(r) of the NEMA which states that, "Sensitive vulnerable, high dynamic or stressed ecosystems, such as ..., wetlands and similar systems require specific attention in management and planning procedures, especially where they are subject to significant human resource usage and development pressure" (NEMA, section 2(4)(r)).

The Judgment of the Court

The High Court upheld the application brought by the Applicants and rendered the decision made by the Ministers in terms of section 48 of NEMPAA reviewable and set aside. The court made the remittance subject to the following directives: (i) the Ministers has to comply with sections 3 and 4 of PAJA; (ii) the Ministers has to take into account the interests of the local communities and the environmental principles referred to in section 2 of NEMA, (iii) the Ministers has to defer any decisions in terms of section 48(1)(b) of NEMPAA, until finalisation, of the various appeals relating to the granting of authorisations by other officials, and lastly (iv) the Ministers may not consider the granting of permission to conduct commercial mining in MPE in terms of section 48(1)(b) of NEMPAA until a management plan for the MPE has been approved by the MEC. The court reasoned as follows;

- That the decisions by both the Minister of Environmental Affairs and the Minister of Mineral Resources were procedurally unfair. This was because the decisions were not taken in an open and transparent manner or in a manner that promoted participation by interested parties. This resonates with the judgment in *Aquafund (Pty) Ltd v Premier of the Western Cape* (1997 7 BCLR 907 (C) 916E) which it was held that "if it is accepted that every person is entitled to lawful administrative action, it must follow that every person must be entitled to such



information as is reasonably required by him to determine whether his right to lawful administrative action has been infringed or not. If a person is not able to establish whether his rights have thus been infringed, he will clearly be prejudiced.”

- That the Ministers relied on the processes followed by other decision-makers instead of exercising their discretion under the Protected Areas Act independently. Davis J stated: "My initial impression of the Ministers' method of exercising their discretion was simply to apply a tick-box approach, namely had all other organs of state given their approvals? If so, then permission is granted ... It is to my mind, astounding that in an admitted novel procedure, the Ministers decided (if indeed they had done so) that it would be procedurally fair not to hear the applicants while well-knowing that each and every preceding authorisation had been hotly contested.”
- That section 48(1)(b) and section 48(4) of NEMPAA should be interpreted to mean the following: “despite the fact that a person may have obtained all the necessary authorisations’ required in terms of all other applicable statutory provisions in order to lawfully conduct mining activities on a certain portion of land, should that land fall within protected environment as contemplated in NEMPAA, then such a person would, in addition need to obtain the written permission of both the Ministers of Environmental Affairs and Mineral Resources to do so. In considering the request for such permission, the Ministers shall act as custodians of such protected environment and with a strict measure of scrutiny take into account the interests of the local communities and environmental principles referred to in section 2 of NEMA.” The court thus clarified the fact that both the Minister of Environmental Affairs and the Minister of Mineral Resources have an obligation to, when considering an application for mining in a protected environment, exercise their discretion independently and to *inter alia* consider the interests of the local communities.
- That the Ministers’ failure to apply a cautionary approach when dealing with "sensitive, vulnerable, highly dynamic or stressed ecosystems" amounted to "an impermissible abdication of decision-making authority."

Commentary

Mining activities hold immense potential to undermine the conservation objectives underlying protected areas. One such protected area that was at the center of litigation in the case of *Mining and Environmental Justice Community Network of South Africa and Others v Minister of Environmental Affairs and Others* is the Mabola Protected Environment. It was declared a Protected Environment in terms of section 28 of NEMPAA on 22 January 2014. Section 28 (1) of NEMPAA provides for the declaration of a defined area as a Protected Environment in order to, “to enable owners of land to take collective action to conserve biodiversity in their land and to seek legal recognition (section 28(2)(b)) and to ensure that the use of natural resources in the area is sustainable (section 28(2)(e)).” The Mabola Protected Environment is located within southern Mpumalanga province of South Africa, and is widely recognised as the site of some of the most sensitive and unique biodiversity in the country such as the Wakkerstroom montane grasslands and Paulpietersburg moist grassland. It contains vast un-fragmented grasslands and irreplaceable biodiversity features in terms of the Mpumalanga Biodiversity Conservation Plan (MTPA, 2006). Species of conservation concern occurring within the Mabola Protected Environment include all three species of cranes occurring in South Africa, namely the Blue Crane, the Wattled Crane and the Grey Crowned Crane. The Wattled Crane is classified as endangered and the Blue Crane is endemic to South Africa. As has been highlighted, the litigation was sparked by coal mining rights in the Mabola Protected Environment that had been granted to a mining



company. It is now opportune to explain briefly the right to a healthy environment as well as the required authorisations in respect of mining in South Africa.

The Constitution of the Republic of South 1996 (hereinafter, the Constitution) is the supreme law of the land (section 2). Any law or conduct inconsistent with it is invalid to the extent of the inconsistency. The Constitution contains a Bill of Right. Of interest is section 24 of the Constitution which provides that “everyone has the right to an environment that is not harmful to their health or well-being.” Furthermore, “to have the environment protected for the benefit of present and future generations through reasonable legislative and other measures that (i) prevent pollution and ecological degradation, (ii) promote conservation and (iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.” In order to give effect to this environmental provision, various legislation has been enacted. In the Preamble of the Mineral and Petroleum Resources Development Act 28 of 2002 (hereinafter, the MPRDA), the State affirms “its obligation to protect the environment for the benefit of present and future generations, to ensure ecologically sustainable development of mineral and petroleum resources and to promote economic and social development.” Section 3 of the MPRDA states that “the country’s mineral resources belong to the nation” (section 3(1)) and that “the State is subsequently appointed as custodian of these resources” (section 3(2)). Furthermore, “as custodian the State has the ultimate responsibility to grant, issue, control, administer and manage all rights in minerals” (section 3(2)). In order for mining activities to commence in South Africa, one must have obtained the following authorisations’: (i) a mining right in terms of section 23(1) of the MPRDA; (ii) the approval of the environmental management programme in terms of section 39 of the MPRDA; (iii) an environmental authorisation for listed activities in terms of section 24 of the NEMA; (iv) a water use licence in terms of section 22(1)(b) of the NWA; and (v) permission for a change of land-use of the properties comprising the mining area from agricultural and/or conservation purposes to mining in terms of section 26 (4) of the Spatial Planning and Land Use Management Act 16 of 2013. Furthermore, should the proposed mining area fall within a protected area, the written permission of the Minister of Environmental Affairs and the Minister of Mineral Resources are also required in terms of section 48 of the NEMPAA.

On review in the case under discussion, the authorisation given for coal mining to commence in the Mabola Protected Area, was remitted to the Minister of Environmental Affairs and the Minister of Mineral Resources for reconsideration. The reason was that the decisions were taken in the absence of proper and meaningful consultations with the interested parties and hence were therefore procedurally unfair. This finding by the court *inter alia* highlights the fact that communities are rarely meaningfully consulted during the mining approval process, resulting in uninformed and poor government and industry decisions that do not reflect community perspectives or have their support. Without access to information and meaningful consultation, communities cannot defend the rights threatened by mining or exercise their rights to participate in government and to have effective remedies for rights violations.

The judgment is therefore, important as it cautions the Minister of Mineral Resources and the Minister of Environmental Affairs to do proper consultations and to be fully transparent when considering whether to grant authorisation for mining in a protected area in terms of section 48 of the NEMPAA. Furthermore, it highlights the fact that stakeholder participation needs to be taken seriously by both the mining company and the government. Furthermore, the judgement is a reminder of the overarching role transparency plays in administrative justice. In the case of *Bengwenyama Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd* (CCT 39/10 2010 ZACC 26),

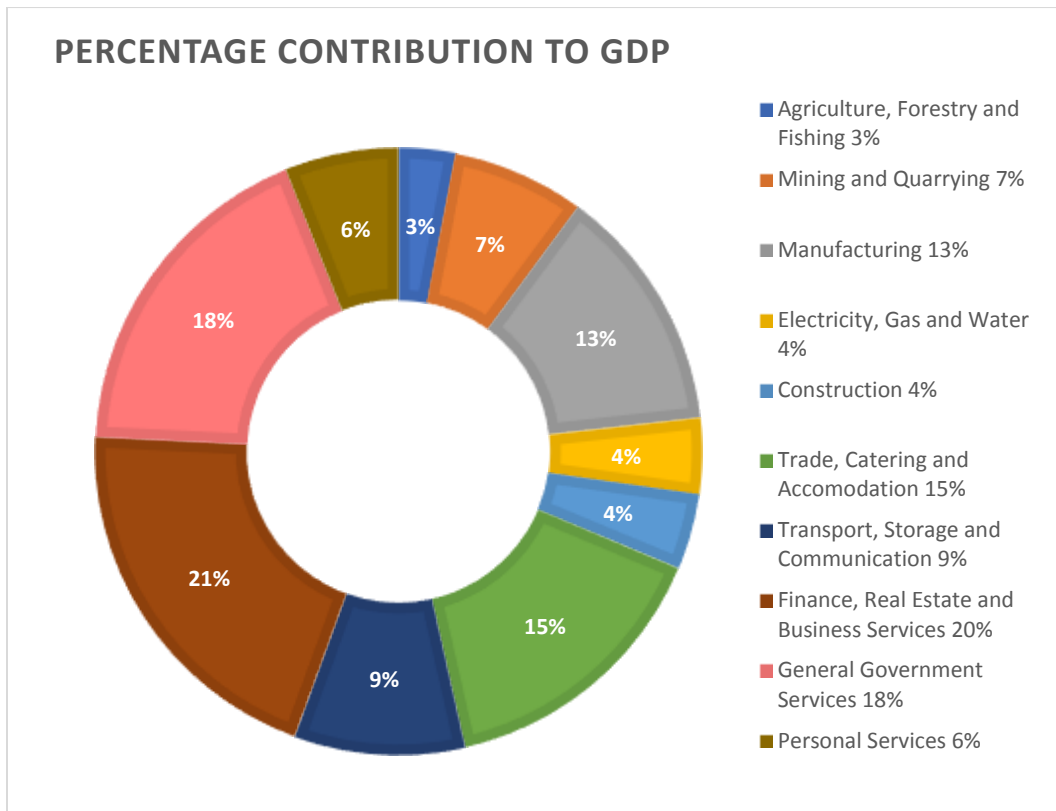


the Constitutional Court also underscored the importance of holding consultations. It *inter alia* held that consultations were crucial for the purposes of assessing the possibility of accommodation between the parties involved as well as providing all the necessary information on the proposed mining operations so that those affected could have an understanding of the possible impact of mining on their lives and be in a better position to make an informed decision.

Mining, Tourism and Economic Growth

The South African economy is characterized by a number of sectors. These include the mining sector, agricultural sector, manufacturing sector, construction sector, communication sector, financial sector and the retail sector. These different sectors all contribute to the Gross Domestic Product (GDP) of the country. The pie chart below shows the percentage contribution to total nominal GDP in the second quarter of 2018.

Figure 1. Contributions to South African GDP



Source: Statistics South Africa, 2018

According to *Statistics South Africa* data for the second quarter of 2018 illustrated in the chart above, the largest sectors in South Africa are noted to be the finance real estate and business services with 21% whilst government has 18% and trade, catering and accommodation has 15% (Statistics South Africa, 2018). The manufacturing sector is in the fourth place with 13%, followed by the transport and communication sector with 9%. The mining and quarrying contribute 7% to GDP whilst personal services contribute 6%. The construction sector and electricity, gas and water sector each contributes 4% whilst the agriculture, forestry and fishing sector contribute the



smallest portion to GDP levels in the second quarter of 2018. It is noteworthy that the tourism sector is not measured as a sector in its own right. The reason for this is that in the national accounts, tourism is not a clearly defined industry in the International Standard Industrial Classification of all Economic Activities 35 (ISIC), but rather an amalgamation of industries such as transportation, accommodation, food and beverage services, recreation and entertainment, travel agencies, etc. (Stats SA, 2016).

Nonetheless, tourism is a significant contributor to the South African economy and to job creation. It directly contributed 2,9% to South African gross domestic product (GDP) in 2016 (Stats SA, 2016). The Chamber of Mines states that, “although the mining sector no longer dominates the South African economy as it once did, mining still makes a significant contribution to the GDP” (Chamber of Mines South Africa, 2017). According to Minerals Council South Africa for the year 2018, the mining industry contributed R356 billion towards South Africa’s GDP. It also reveals that, “mining directly contributed R93 billion to fixed investment in 2018, while R7.6 billion in royalties and R22 billion in taxes were paid to the South African government” (Minerals Council South Africa, 2018). Minerals Council South Africa also reports that the mining sector in 2018 contributed significantly to employment, with 453 543 persons being employed in the sector (Minerals Council South Africa, 2018). It is argued that notwithstanding the positive contributions to the development of the country, mining activities hold immense potential to undermine the conservation objectives underlying protected areas. Although mining has undeniable importance to the South African economy, the environmental degradation it causes can generate profound impacts on ecosystems and landscapes and consequently on ecotourism.

A case for Ecotourism

The Mabola Protected Environment was identified by the Mpumalanga Tourism and Parks Agency (MTPA) for declaration as a Protected Environment with the vision of developing the area for ecotourism development. One of the significant aspects of ecotourism is sustainability. Ecotourism refers to nature-oriented travel that promotes and finances conservation and resource protection and adds to the local economy (Gunn, 2002). Ecotourism “is grounded on sustainability which attempts to provide a resource base for the future and seeks to ensure the productivity of the resource base, maintain biodiversity and avoid environmental challenge while ensuring equity both within and between generations” (Wearing & Neil, 2009). It “is premised on the idea that it can only be sustainable if the natural and cultural assets it is reliant upon survive and prosper” (Wearing & Neil, 2009).

Ecotourism “often take place in protected and remote regions, areas of exceptional beauty, ecological interest and cultural importance” (Wearing and Neil, 2009). These areas are *inter alia*, “established to conserve biodiversity and to halt the large-scale loss of natural ecosystems.” However, despite their importance, these struggle to achieve their conservation objectives because of threats from competing land-use options. As has been highlighted, it is often within the most productive ecosystems that extractive industries such as mining overlap with conservation priorities. Mining activities hold immense potential to undermine the conservation objectives underlying protected areas. For instance, the envisaged benefit when the Mabola Protected Environment was declared, was “a well-managed natural environment and livestock sector and economic development and job creation through tourism, wildlife enterprises and rural recreational developments.” Where mining is permitted to take place in protected areas, this impacts negatively on ecotourism. Potential impacts of mining activities on ecotourism



destinations includes visual landscape alterations, environmental degradation, air, noise and water pollution and loss of wildlife.

It is submitted that the judgement in *Mining and Environmental Justice Community Network of South Africa and others v Minister of Environmental Affairs and others* provides a compelling case for ecotourism in South Africa. The judgement is significant in that it *inter alia*, underscored the need for government to apply a cautionary approach when dealing with "sensitive, vulnerable, highly dynamic or stressed ecosystems" which *inter alia* hold immense potential for ecotourism. The granting of permission for coal mining to commence in the Mabola Protected Environment, evidenced a failure on the part of government to effectively carry out its mandate in terms of the NEMPAA and other relevant legislation. South Africa is a water-stressed country, and the Mabola Protected Environment, where permission was granted for coal mining, has particular hydrological significance for the country as a whole. Mining in this protected environment would have resulted in water pollution resulting from acid mine drainage. Acid mine drainage is water flowing from mine sites that has become acidified by contact with sulphides in the mining waste rock that have been exposed to air (WWF, 2011). The resulting water is very acidic and high in salts and heavy metals (McCarthy, 2017). Acid mine drainage often leaches into aquifers or flows into rivers and streams, causing widespread devastation by sterilising soils, contaminating food crops, and harming the health of humans, animals and plants (Zero Hour, 2016).

While South Africa benefits from the economic growth arising from mining, it is argued that there are double benefits to be reaped from promoting ecotourism in protected areas, namely economic benefits as well as the conservation of natural resources. Ecotourism in protected areas can lead to increased economic benefits through both the direct expenditures of tourists and associated employment opportunities it generates. Wearing and Neil states that, "the economic benefits of ecotourism have the potential to provide additional support for the protected areas and surrounding local communities" (Wearing & Neil, 2009). Protected areas constitute such a crucial ingredient in ecotourism due to among others, their natural, historical and cultural richness (Wearing & Neil, 2009). Thus, "the setting in which ecotourism operates includes the 'legally protected areas' as they offer a guarantee of their long-term attractivity." However, as has been highlighted in the case of *Mining and Environmental Justice Community Network of South Africa and others v Minister of Environmental Affairs and others*, the attractivity of "protected areas," in some cases remains an elusive goal as would have been the case had coal mining operations in the Mabola Protected Environment commenced.

Conclusion

While it is indisputable that mining has undeniable importance to the South African economy, the matter of concern has been the environmental degradation it causes which has huge potential to generate profound impacts on ecosystems and landscapes and consequently on ecotourism. Protected areas are a critical element of South Africa's conservation strategy. However, these continue to be degraded and struggle to achieve their conservation objectives because of activities such as mining that pose challenges to the conservation strategies. As has been highlighted, government has, through the NEMPAA and the MPRDA and other relevant legislation, accordingly imposed prohibitions on mining activities taking place within protected



environments. While the measures are commended, the implementation of these legal mechanisms has proven problematic in practice and triggered litigation such as in the discussed recent case of *Mining and Environmental Justice Community Network of South Africa and Others v Minister of Environmental Affairs and Others*.

The judgement in this case should serve as a call for government, as custodian of protected environments to effectively and diligently perform its crucial role of ensuring that declared protected environments are protected. In considering the request for permission to mine in protected environments, government should act with a strict measure of scrutiny “taking into account the interests of the local communities and environmental principles referred to in section 2 of the NEMA.” The judgement should also serve as a call for mining companies to fully consider the potential impact of their proposed mining activities, particularly when they seek authorisation to commence mining in a protected environment. Furthermore, since for mining in protected areas “interested and affected parties” span beyond surrounding municipalities and communities and include the country as a whole, mining companies should ensure that they have extensive meaningful consultations with all stakeholders. The researcher concludes by submitting that mining in protected areas should be prohibited as protected areas not only help protect our biodiversity, particularly our incredible wildlife and important natural ecosystems, but are also a key part of South Africa’s reputation as a global ecotourism destination. Furthermore, ecotourism should be promoted in protected areas renowned for among others, their outstanding beauty and extraordinary ecological interest and government should devise ways of returning the benefits to the local communities while supporting the protection of protected areas.

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