IN THE WATER TRIBUNAL

CASE NO: WT01/17/WC

In the appeal of:

WEST COAST ENVIRONMENTAL

PROTECTION ASSOCIATION **APPELLANT**

MINISTER OF WATER AND SANITATION **FIRST RESPONDENT**

CHIEF DIRECTOR: WESTERN CAPE

DEPARTMENT OF WATER AFFAIRS **SECOND RESPONDENTS**

ELANDSFONTEIN EXPLORATION

AND MINING PTY (LTD) **THIRD RESPONDENT**

Quorum: Adv. Ntika Maake (Chair). Ms. L. Mbanjwa (Additional Member)

Hearing dates	**Submission of Heads of Argument and Judgement**
22 to 24 October 2019	Appellant: 30 April 2021
11 to 13 December 2019	First and Second Respondents: 10 May 2021
10 to 12 February 2020	Third Respondent: Kropz (Pty) Ltd: 12 May 2021
1 to 4 February 2021	Appellant Supplementary Heads of Argument: 21 May 2021
	Panel: Judgement and Order: 5 September 2021
	Panel: Reasons for Judgement: 5 October 2021

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RULING ON THE APPEAL

1. Introduction and notice of appeal

[1] I am penning this judgement during a very difficult period in the country and world-wide because of the economic melt-down that was caused by the Covid-19 pandemic. Statistics South Africa reported in its Quarterly Labour Force Survey (QLFS)-Q2 on 24 August 2021 that the rate of unemployment in the country is at 34,4% of the population which is an unwelcomed upwards trajectory.[1] Economic growth and the creation of sustainable jobs is desperately needed in the country. This appeal matter involves the new regime in the extractive industry called the One Environmental System (OES). It is an agreement concluded amongst the Ministers responsible for Mineral Resources, Environmental Affairs and Water & Sanitation in terms of section 163 of the National Water Act (NWA).[2] It was introduce on 8 December 2014.[3] Two of the features of the OES is that the Department of Mineral Resources is the competent authority to approve Environmental Authorisations soritical to the mining activities and that the three departments,[4] will synchronize (align) their activities and approve applications for mining rights within 300 days. This appeal offered me the opportunity as the Chairperson of the Water Tribunal to traverse these uncharted terrains and set the tone for the resolution of future disputes of this nature. The serendipitous nature of this case is that the OES was the title of my dissertation for the requirement of my Masters in Extractive Industries in Africa. This edification could not have come at a better time.

[2] The difficulty with this matter is that the mining right was granted to Kropz on 15 November 2015 while the application for the mining right was submitted during the transitional period before the OES was introduced. Even though the country is in dire need for the creation of new jobs, the Water Tribunal remain duty bound to

[1] http://www.statssa.gov.za/publications/P0211/P02112ndQuarter2021.pdf
[2] Act 36 of 1998.
[3] Introduced in terms of section 30 of the National Water Amendment Act 27 of 2014.
[4] The Departments of Mineral Resources; Environmental Affairs; Water and Sanitations.

ensure that Water Use Licence (WULA) for mining activities are being issued after compliance with the prescripts of the NEMA principles as stipulated in section 2 of the National Environmental Management Act (NEMA).[5] In adjudicating over this intricate matters, the Tribunal is bound to purposively interpret all the relevant statutes in the WULA process with ultimate intention to promoting sustainable exploitation of mineral resources for purposes of economic development. This then enjoins the Tribunal to implement a balancing act to save livelihoods and to preserve the environment for future generations.

[3]. This is an appeal before the Water Tribunal in terms of section 148(1) (f) of the National Water Act,[6] 36 of 1998 ("the Act") against the granting of a water use licence 01/G10M/ABCGIJ/5296 ("the WUL") by the first and second respondent to the third respondent.[7] The third respondent, Kropz (formerly Elandsfontein Exploration And Mining Pty (Ltd), applied for an integrated water use licence ("the IWULA") on 25 February 2016.[8] The WUL was granted by the Department of Water and Sanitation on 7 April 2017.[9] The appellant filed their notice of appeal on 26 June 2017. Section 148 (3) states as follows: "An appeal must be commenced within 30 days after –

(a) publication of the decision in the Gazette;

(b) notice of the decision is sent to the appellant; or

(c) reasons for the decision are given, whichever occurs last."

Procedural and Substantive grounds of appeal.

[4]. The appeal was based on among others the following grounds, as stipulated in paragraphs 4-6.[10]

2. The appeal is based on the following grounds, further substantiated in this document:

[5] Act 107 of 1998.

[6]Section 148. Appeals to Water Tribunal

(1) There is an appeal to the Water Tribunal –

(f) subject to section 41(6), against a decision of a responsible authority on an application for a licence under section 41, or on any other person who has timeously lodged a written objection against the application"

[7] See page 3492 of the RoD.

[8] See page 3491 of the RoD.

[9] See page 3492 of the RoD.

[10] See page 3 to 4 of the Appeal records.

2.1. The water use licence application should have been refused on the basis of available information.

2.2. The information before the decision-maker was insufficient for granting a water use licence.

2.3. The decision was premature and in contravention of section 41 (5) of the National Water Act, 36 of 1998.

2.4. The decision-making process was procedurally unfair.

2.5. The decision-maker failed to be guided by the precautionary principle and public trust doctrine; and

2.6. The decision-maker and its delegated functionaries conducted themselves in a manner creating a reasonable apprehension of bias

[5]. There was an objection raised by the third respondent regarding the late filling of the appeal.[11] The objection was dismissed by this Tribunal on 16 November 2017.

The intricate nature of the appeal

[6]. This matter is very intricate in nature because it involves the oral evidence of highly specialist expert witnesses in the water management sector. The appellant relied solely on the evidence of Dr. Riemann, a highly respected Hydrogeologist with more than 30 years' experience in groundwater and water resource management. He holds an MSc in geology from the University of Kiel in Germany, and a PhD in geo-hydrology from the IGS at the University of the Free State. The third respondent relied on the expert evidence of Dr. J. Nel an independent and respected hydrologist with a PhD in groundwater,[12] and Dr. Botha a water resources specialist with a PhD in hydrology.[13] The matter was further complicated by the fact that Kropz was awarded a mining right during the transitional period just before the introduction of the One Environmental System in the extractive industries in South Africa.[14]

[7]. The intricate nature of this matter was also confirmed by Counsel for the appellant during the hearing on 3 February 2021. Counsel for the appellant made an extra-

[11] Case No: WT 01/17/WC, ruling date 16 Nov.2017.
[12] See page 66 of the 3rd Respondent's Heads of Argument
[13] See page 61 of the 3rd Respondent's Heads of Argument
[14] See pages 340-350 of the Appeal records.

ordinary application at the end of her cross-examination of Dr. Nel. She asked the panel to allow Dr. Riemann, being the sole independent witness of the appellant to address the panel after she completed the cross-examination of Dr. Nel. She further truly and honestly conceded the fact that she could not properly phrase her cross-examination questions to Dr. Nel, hence she applied to the panel to ask permission for Dr. Riemann to address the panel on extremely technical issues that she could not articulate to the panel. The application was accordingly dismissed. It is indeed a case where the Tribunal had to listen to highly technical inputs of the experts and juxtapose them to arrive at a decision that acknowledges the sapiential information from the specialist and then apply the law in the relevant field.

Attempted Settlement Agreement

[8]. It is also important to note that the appellant and the third respondent requested the panel to allow them time to attempt to enter into a Settlement Agreement on two occasions during the hearing, *vide* 23 October and on 11 December 2021. Even though the appellant and the third respondent did not disclose to the Tribunal the details of the settlement agreement, Counsel for the appellant and the third respondent committed to submit a draft settlement agreement the following day *vide* 24 October 2019, subject to both Counsels' clients being consonant to the terms and conditions of the settlement agreement. On 23 October 2019, just after the lunch adjournment, Counsel for the third respondent said the following "*We've got the bones of a practical agreement together. And what we would ask for you is the opportunity to prepare a written document this afternoon, which we believe should resolve some of the issues which have arisen*". Counsel for the appellant confirmed the possibility of concluding the settlement agreement by indicating that "*Mr. Chairperson. We have pulled up the settlement which will provide a practical way forward. And the terms that we are discussing would then also contemplate if for whatever reason, the parties can't find common ground that it would still facilitate early hearing in December, should that be necessary at the end of the day. We're hopeful that we could come to a sensible interim arrangement*."

[9]. Counsel for the first and second respondent was not party to the negotiations for the Settlement Agreement. Since the water use licence was issued by the first and

second respondent, and that their Counsel was not part of the negotiation for the Settlement Agreement, it is safe to assume that such terms and conditions of the Settlement Agreement were not about the issuance of the water use licence. The appellant and the third respondent do not have the authority to amend the decision nor the conditions of the IWUL without the presence and the approval of the first and second respondent. At best their negotiation would be confined to the strict adherence to the licence conditions since the licence conditions form an integral part of the activities of the Water Monitoring Committee.

Identification of Parties and major role players

[10]. The Appellant is West Coast Environmental Protection Association ('WCEPA'), a non-governmental organisation duly constituted under the law of South Africa. It is an interested and affected party because of the mining activities that will take place in the area. The appellant submitted an objection towards the approval of the Integrated Water Use Licence Application (IWULA) on 10 February 2017, well in time before the water use licence was granted.[15] The appellant is acting in the public interest, which the South African Law Reform Commission defines as follows: "A public interest is one brought by a plaintiff who, in claiming the relief he or she is moved by a desire to benefit the public at large or a segment of the public. The intention of the plaintiff is to vindicate or protect the public interest, not his or her own interest, although he or she may incidentally achieve that end as well."[16] The appellant exercised its rights in terms of section 38 of the constitution.[17]

[11]. The first and second respondents are the Minister of Water and Sanitation and the Chief Director, Department of Water Affairs, for the Western Cape Province. They are the parties who received the application for the IWULA on 25 February 2016 and subsequently approved it on 7 April 2017.

[15] See page 8 of the Appeal records.
[16] Hoexter C; Administrative Law in SA 2021 (2nd Edition) (Juta) 505.
[17] Section 38 Enforcement of rights
Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are –
(d) anyone acting in the public interest; and
(e) an association acting in the interest of its members.
The appellant is exercising its rights in term of this section of the Constitution

[12]. Water Use Authorization Assessment Advisory Committee (hence fourth WUAAAC) is a committee that is empowered by the DWS policy to make recommendations to either issue or decline the IWUL after traversing comments from the internal specialists of the department vide National Water Recourses Planning,[18] Geohydrologist,[19] Resource Protection,[20] and the Civil Designs.[21] WUAAAC also consider the inputs/comments of external stakeholders such as the Department of Environmental Affairs, Department of Mineral Resources, Department of Agriculture Forestry and Fisheries and other Interested and Affected Parties (I&AP's). The appellant falls under the I&APs.[22]

[13]. The decision-maker is the Director-General of the Department of Water and Sanitation who approved the issuance of the WUL on 7 April 2017 pursuant to the recommendation of the WUAAAC.[23]

[14]. The third respondent is Elandsfontein Exploration and Mining (Pty) Ltd which has since changed its name to Kropz Elandsfontein (Pty) Ltd (hereafter 'Kropz'), a private company duly incorporated in terms of the law of South Africa and carrying on the business of exploration and mining.

B. Legal Framework applicable in this matter

B.1.The Constitution of the Republic of South Africa

[15]. **Section 2 Supremacy of the Constitution.**

This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.[24]

[16]. **Section 7 Rights**

(1) This Bill of Rights is the cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human

[18] See page 3473 of RoD volume 15
[19] See page 3473 to 3481 of RoD volume 15.
[20] See page 3473 to 3483 of RoD volume 15
[21] See page 3483 of RoD volume 15
[22] See page 3483 to 3485 of RoD volume 15.
[23] See page 3492 of RoD volume 15.
[24] See section 2 of the constitution.

dignity, equality and freedom.[25] The right to access mineral deposits (phosphate in this matter) as well as clean water and a healthy environment are part of a sleuth of the Bill of Rights that is assured protection in the Constitution. In this matter, the panel is enjoined to deliver a ruling that will find a balance between the competing rights to economic development and protection of the scarce water resources and the environment for the benefit of the current and feature generations. The panel is duty bound to deliver a fair judgement that is guided by the principles of sustainable developments, which is a concept that is at the heart of economic development by exploiting mineral resources in a manner that will be at peace with the environment and the water resources.

[17]. **Section 8 Application**

The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary, and all organs of State.[26]

[18]**. Section 24 Environment.**

Everyone has the right –

(a) to an environment that is not harmful to their health or well-being; and

(b) to have the environment protected, for the benefit of present and future generations (…), (iii) [s]ecure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.[27] The National Environmental Management Act 107 of 1998 was promulgated to operationalise section 24 of the constitution.

[19]. **Section 27 Healthcare, food, water and social security**

(1) Everyone has the right to have access to –

(b) sufficient food and water.[28]

The right to access to clean water on equitable basis is derived from this section of the Constitution. The right to access to clean water for both human consumption, agriculture, and economic development is the subject matter of this

[25] See section 7 of the constitution.
[26] See section 8 of the constitution.
[27] See section 24 of the constitution.
[28] See section 27(1) (b) of the constitution.

hearing. The National Water Act 36 of 1998 was promulgated to operationalise section 27 of the Constitution.

[20]**. Section 32 Access to information**

(1) Everyone has the right of access to – (a) any information held by the state.[29] This right is the provenance to the procedure to get access to information that is held by an organ of sate such as the Department of Water and Sanitation in this matter. The Promotion of Access to Information Act (PAIA),[30] was promulgated to operationalise this section of the Constitution. Interested and affected parties (I&AP's) like WECEPA are entitled to get access to the relevant information regarding the WULA. They were not supposed to access the Record of Decision (RoD) documents by way of a court order in terms of section 4 of the PAIA. The appellant is a non-governmental organisation (NGO) and was not supposed to be burdened by costs for legal fees to access the RoD records. The Department infringed on the appellant's constitutional right to access to information.

[21]. Chamberlain L,[31] meritoriously articulated the importance of granting access of the relevant information to Interested and affected parties like the appellant in her analysis of the case of Company Secretary of ArcelorMittal South Africa v Vaal Environmental Justice Alliance.[32] She cogently articulated the importance of this judgement soritical to the granting of access to information to I&AP's like WECEPA. "Regarding the role of civil society, the court confirmed that the regulatory framework applicable to the environmental sector envisages a form of collaborative corporate governance in relation to the environment, based on the notion that environmental degradation affects us all."[33] Although this case was between an NGO and a private company, the legal principles laid down in this judgement is applicable to state organs like the Department of Water & Sanitation. This unacceptable behaviour by the Department of Water & Sanitation is incongruous to the provision of section 32 of the constitution and it has to be discontinued immediately.

[29] See section 32(1) (b) of the constitution.
[30] Act 2 of 2000
[31] Chamberlain L; Fighting Companies for Access to Information (2016) SUR 23 - v.13 n.23 at page 201.
[32] (69/2014) [2014] ZASCA 184.
[33] Chamberlain L; Fighting Companies for Access to Information; supra at page 201.

[22]. **Section 33 Just administrative action**

(1) Everyone has the right to administrative action that is lawful, reasonable, and procedurally fair.

(2) Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.[34] This right is the provenance to the procedure for public participation during an application for a mining right as well as IWULA. The Promotion of Access to Just Administration Act,[35] was promulgated to operationalise this section of the Constitution.

[23]. **Section 34 Access to courts**

Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.[36] In this matter all the parties were afforded an opportunity to present their cases before the panel as per the provisions of section 7 (2) of the Tribunal Rules.[37]

[24]. **Section 39 Interpretation of Bill of Rights**

(1) When interpreting the Bill of Rights, a court, tribunal or forum –

(a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom; (b) must consider international law; and (c) may consider foreign law.

(2) When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.

(3) The Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill.[38]

[34] See section 33(1) & (2) of the constitution, as well as section 5 of PAJA.
[35] Act 3 of 2000.
[36] See section 34 of the constitution.
[37] Tribunal Rules published in terms of Government Gazette No.926 on 23 November 2005.
[38] See section 39 of the constitution.

I will later apply these interpretation guidelines from the Constitution when I determine whether the decision-maker has interpreted section 27 (1) of the National Water Act accurately.

B. The National Environmental Management Act 17 of 1998

[25]**. Section 1 Definitions** "**competent authority**"

In respect of a listed activity or specified activity, means the organ of state charged by this Act with evaluating the environmental impact of that activity and, where appropriate, with granting or refusing an environmental authorisation in respect of that activity.[39]

[26]. "**Environmental authorisation**", when used in Chapter 5, means the authorisation by a competent authority of a listed activity or specified activity in terms of this Act, and includes a similar authorisation contemplated in a specific environmental management Act;

"**Sustainable development**" means the integration of social, economic, and environmental factors into planning, implementation, and decision-making so as to ensure that development serves present and future generations;

[27]**. Section 2. "NEMA Principles**" means

(1) The principles set out in this section apply throughout the Republic to the actions of all organs of state that may significantly affect the environment and-

(a) shall apply alongside all other appropriate and relevant considerations, including the State's responsibility to respect, protect, promote, and fulfil the social and economic rights in Chapter 2 of the Constitution and in particular the basic needs of categories of persons disadvantaged by unfair discrimination.

(b) serve as the general framework within which environmental management and implementation plans must be formulated;

(c) serve as guidelines by reference to which any organ of State must exercise any function when taking any decision in terms of this Act or any statutory provision concerning the protection of the environment;

[39] See section 2 (1) a-e of Nema 1998

(d) serve as principles by reference to which a conciliator appointed under this Act must make recommendations

(e) guide the interpretation, administration and implementation of this Act, and any other law concerned with the protection or management of the environment.[40]

(2) Development must be socially, environmentally, and economically sustainable.[41]

[28]. **INTEGRATED ENVIRONMENTAL MANAGEMENT**

23. General objectives

(1) The purpose of this Chapter is to promote the application of appropriate environmental management tools in order to ensure the integrated environmental management of activities.[42]

(2) The general objective of integrated environmental management is to-

(a) promote the integration of the principles of environmental management set out in section 2 into the making of all decisions which may have a significant effect on the environment;

(b) identify, predict and evaluate the actual and potential impact on the environment, socio-economic conditions and cultural heritage, the risks and consequences and alternatives and options for mitigation of activities, with a view to minimising negative impacts, maximising benefits, and promoting compliance with the principles of environmental management set out in section 2;

(c) ensure that the effects of activities on the environment receive adequate considerations before actions are taken in connection with them.

(d) ensure adequate and appropriate opportunity for public participation in decisions that may affect the environment;

[40] Section 2(1) a-e of Nema of 1998.

[41] Section 3 of Chapter 2 of Nema of 1998.

[42] HiII R.C; Integrated Environmental Management Systems in the implementation of projects. (2000) (Vol.96) South African Journal of Science, page 50 said "IEM South Africa embodies the synthesis of scientific and managerial competence that is necessary to attain effective environmental management in the implementation of projects."

(e) ensure the consideration of environmental attributes in management and decision-making which may have a significant effect on the environment; and

(f) identify and employ the modes of environmental management best suited to ensuring that a particular activity is pursued in accordance with the principles of environmental management set out in section 2.

[29]. This progressive route which was adopted by government after receiving a lot of studies and submissions from interested and affected parties, especially big companies in the mining and agriculture sectors of the economy. They lamented the fact that the procedures to obtain mining rights and water use licences were cumbersome, fragmented and in many instances duplicated and contradictory in nature.

Kotzé LJ,[43] cogently summarised the problem as follows "*Environmental governance in the 21st century in South Africa faces serious challenges in terms of improving service-delivery. Despite the progressive domestic environmental law framework, fragmentation of the environmental governance effort is a reality in South Africa. Fragmentation presents itself in terms of structural fragmentation between the various spheres of government and the various line functionaries in each sphere. Environmental statutes are also fragmented, since the legislative framework consists of a multitude of acts which are silo-based and environmental-media specific. This is especially observed in terms of the various environmental authorisation procedures that are prescribed by the legal framework. This matrix framework of fragmented legislation further gives rise to duplication of administrative procedures, jurisdictional overlap, and a time-consuming and confusing governance effort*".

[30] Kotzé LJ, further lamented the situation by stating that "*The current framework of environmental legislation prescribes a multitude of procedures, processes and environmental management tools that cause an overlap of jurisdictions and*

[43] Kotzé LJ; Improving Unsustainable Environmental Governance in South Africa: The case for Holistic Governance 2006 (1) (PER) at page 1.

give rise to confusing authorisation processes and procedures that must be followed by a prospective authorisation applicant".[44]

[31]**. Section 24 (1) Environmental authorisations**

(1) In order to give effect to the general objectives of integrated environmental management laid down in this Chapter, the potential consequences for or impacts on the environment of listed activities or specified activities must be considered, investigated, assessed and reported on to the competent authority or the Minister responsible for mineral resources, as the case may be, except in respect of those activities that may commence without having to obtain an environmental authorisation in terms of this Act.[45]

D. The Mineral Petroleum Resources Development Act 202 of 2004

[32]. The purpose of this Act is "To make provision for equitable access to and sustainable development of the nation's mineral and petroleum resources; and to provide for matters connected".

One of the objectives of this Act is to affirm the State's 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.

[33]. **''Environmental management plan''** means a plan to manage and rehabilitate the environmental impact as a result of prospecting, reconnaissance, exploration or mining operations conducted under the authority of a reconnaissance permission, prospecting right, reconnaissance permit, exploration right or mining permit, as the case may be;

''Environmental management programme'' means an approved environmental management programme contemplated in section 39;

[34] **''Financial provision''** means the insurance, bank guarantee, trust fund or cash that applicants for or holders of a right or permit must provide in terms of sections 41 and 89 guaranteeing the availability of sufficient funds to undertake

[44] Kotzé LJ; Improving Unsustainable Environmental Governance in South Africa; supra at page 5.
[45] Section 24 (1) of the Nema of 1998.

the agreed work programmes and to rehabilitate the prospecting, mining, reconnaissance, exploration or production areas, as the case may be.

''Mining right'' means a right to mine granted in terms of section 23(1). Kropz was granted this right by the DMR on 26 November 2014

''Sustainable development'' means the integration of social, economic and environmental factors into planning, implementation and decision-making so as to ensure that mineral and petroleum resources development serve present and future generations.

[35]. **Section 41 Financial provision for remediation of environmental damage**

(1) An applicant for a prospecting right, mining right or mining permit must, before the Minister approves the environmental management plan or environmental management programme in terms of section 39(4), make the prescribed financial provision for the rehabilitation or management of negative environmental impact. Kropz has complied with this section by making available R9.8 million for this purpose on 10 February 2015.[46]

[36]**. Section 48 Restriction or prohibition of prospecting and mining on certain land.**

(1) Subject to section 20 of the National Parks Act, 1976 (Act No. 57 of 1976), and subsection (2), no reconnaissance permission, prospecting right, mining right or mining permit may be issued in respect of—

(a) land comprising a residential area;

(b) any public road, railway or cemetery;

(c) any land being used for public or government purposes or reserved in terms of any other law; or

(d) areas identified by the Minister by notice in the Gazette in terms of section 49.

This section clearly demonstrates that the Mineral Petroleum Resources Development Act was promulgated with the concept of sustainable development in mind. The Western Cape Department of Environment and Planning confirmed to the Regional Manager: Department of Mineral Resources in Western Cape on 5 September 2014 that the property where

[46] See pages 3586-3587 of RoD. Payment guarantee from Invested Bank dated 10 February 2015.

Kropz will be executing its mining operations is not in a restricted area. "2. This Directorate confirms that the proposed site is not located within an endangered ecosystem listed in terms of the National Environmental Management: Biodiversity Act (Act no. 10 of 2004) (NEMBA)".[47] This letter was a comment by the Western Cape Department of Environment and Planning, which supported the granting of the mining right to Kropz from an environmental perspective.

[37]. **Section 96. Internal appeal process and access to courts**

96.(1) Any person whose rights or legitimate expectations have been materially and adversely affected or who is aggrieved by any administrative decision in terms of this Act may appeal in the prescribed manner to—

(a) the Director-General, if it is an administrative decision by a Regional Manager or an officer; or

(b) the Minister if it is an administrative decision by the Director-General or the designated agency.

(2) An appeal in terms of subsection (1) does not suspend the administrative decision, unless it is suspended by the Director-General or the Minister, as the case may be.

(3) No person may apply to the court for the review of an administrative decision contemplated in subsection (1) until that person has exhausted his or her remedies in terms of that subsection.

It is now common cause that on 14 December 2017, the Department of Mineral Resources dismissed the appeal lodged by Ms. C van Zyl regarding the granting of a mining right to Kropz.[48] Even though the lodging of an appeal by WCEPA does not have the effect of suspending the mining right, Kropz still followed through to defend the granting of its mining rights by the DMR.

[38]. In an oscillatory move, on 1 February 2017 the Western Cape Department of Environment and Planning (DEAP) lodged an appeal against the granting of an environmental authorisation to Kropz for the Rotary Dryer in terms of section 43(1) of MPRDA.[49] This was despite the fact that the (DEAP) confirmed to the

[47] See page 678 of the Appeal records.
[48] See page 434 to 435 of the Appeal records.
[49] See page 448 of the Appeal record

Regional Manager: Department of Mineral Resources in the Western Cape on 5 September 2014 that Kropz' proposed mining activities will take place in an area that is not within an endangered ecosystem listed. DEAP's appeal was rejected by the relevant NEMA appeal authority at the National Department of Environmental Affairs on 15 May 2017.[50] The result of the NEMA appeal authority in favour of Kropz confirms that Kropz had taken concerted efforts within the confinements of the relevant legislation, considering the complicated interplay between the DEA and DMR regarding which department was the competent authority to approve an environmental authorisation for mining activities.

D. The National Water Act 36 of 1998.

[39]. **Section 2 Purpose of the National Water Act (NWA)**

The purpose of this Act is to ensure that the nation's water resources are protected, used, developed, conserved, managed, and controlled in ways, which take into account among other factors–

(a) meeting the basic human needs of present and future generations;
(b) promoting equitable access to water;
(c) redressing the results of past racial and gender discrimination;
(d) promoting the efficient, sustainable, and beneficial use of water in the public interest;
(e) facilitating social and economic development.

[40]. This section is consonance to the interpretation and fundamental principles of this Act as articulated in section 1 of the National Water Act. In short, both sections 1 and 2 of the NWA lay down the basis for a wholesale reform in the water sector with the clear intention to redress the imbalances of the past regarding access to water resources.

[41]. **Section 21. of the NWA. Water uses**

For the purpose of this case, water use includes –

(a) taking water from a water resource;

[50] Ibid.

(e) engaging in a controlled activity identified as such in section 37(1) or declared under section 38(1); (g) disposing of waste in a manner which may detrimentally impact a water resource;(j) removing, discharging or disposing of water found underground if it is necessary for the efficient continuation of an activity or for the safety of people. Kropz applied for the authorisation of the water use of the above-mentioned activities as per the provisions of section 40 of the NWA on 25 February 2016.[51]

[42]**. Section 40 of the NWA. Application for licence**

(1) A person who is required or wishes to obtain a licence to use water must apply to the relevant responsible authority for a licence.

(2) Where a person has made an application for an authorisation to use water under another Act, and that application has not been finalised when this Act takes effect, that application must be regarded as being an application for water use under this Act.

(3) A responsible authority may charge a reasonable fee for processing a licence application, which may be waived in deserving cases.

(4) A responsible authority may decline to consider a licence application for the use of water to which the applicant is already entitled by way of an existing lawful water use or under a general authorisation.

[43]. **Section 41 (3) (4) and (5) of the NWA; Public participation**

In terms of section 41(3) of the NWA, a responsible authority **may** direct that any assessment under subsection (2)(a)(ii) must comply with the requirements contained in regulations made under sections 24(5) and 44 of the National Environmental Management Act, 1998 (Act No. 107 of 1998).

Also, in terms of section 41(4), a responsible authority **may**, at any stage of the application process, require the applicant –

(a) to give suitable notice in newspapers and other media –

(i) describing the licence applied for;

(ii) stating that written objections may be lodged against the application before a specified date, which must be not less than 60 days after the last publication of the notice;

[51] See page 3444 of the ROD.

(iii) giving an address where written objections must be lodged; and

(iv) containing such other particulars as the responsible authority may require.

[44]. Section 41 (1-4) deals mostly with the process of public participation that the Responsible authority should direct the applicant to embark on, if it is necessary. Before the promulgation of the 2017 Regulations Regarding the Procedural Requirements for Water Use Licence Applications and Appeals,[52] a responsible authority had a discretion whether to direct the applicant to embark on public participation or not. It is mandatory for a responsible authority to request the Applicant to embark on a public participation process. The 2017 Regulations were gazetted fourteen days before the IWULA was approved by the decision-maker on 7 April 2017; they would not be applicable in this matter and no legal argument based on these regulations will be sustainable. This section is consonant with section 33 of the Constitution as well as section 4 & 5 of PAJA. Section 41 (5) of the NWA was added by section 3(b) of the National Water Amendment Act. This sub-section of the NWA was added to put into operation a new regime in the mining industry called the One Environmental System.

[45]. **Lifting of the Suspension of the IWUL by the Minister of Water and Sanitation**

Section 148 of the NWA. Appeals to Water Tribunal

(1) There is an appeal to the Water Tribunal –

(f) subject to section 41(6), against a decision of a responsible authority on an application for a licence under section 41, or on any other person who has timeously lodged a written objection against the application;

(2) An appeal under subsection (1) –

(b) suspends any other relevant decision, direction, requirement, limitation, prohibition or allocation pending the disposal of the appeal, unless the Minister directs otherwise.

After the appellant filed its appeal on 26 June 2017 against the granting of IWUL to Kropz, Kropz as the licence holder filed a petition with the Minister dated 17 October 2017 to seek the upliftment of the suspension of the IWUL following

[52] Gazetted on the 24March 2017 in terms of Government Gazette No. 40713.

the provisions of section 148 (1)(f) of the NWA. The Minister duly exercised her powers as contemplated in terms of section 148 (2) (b) of the NWA and uplifted the suspension of the IWUL on 11 December 2017.[53]

[46] **WCEPA's racially infused objection to the mining operation**.

I fully buttress the Minister's decision to uplifting the suspension of Kropz' WUL so that it can continue with its mining activities. WCEPA's reasons for their objections to the mining operations soritical to this IWUL had nothing to do, but only based on racial considerations.[54] The only written reasons advanced by some members of WCEPA in objecting to the mine operations are based on racism.[55] In a Sunday Times article dated 15 March 2015 titled "Uproar over "bantus" moving in on West Coast hamlet", a tourism official for the region Ms. Lizelle Strydom was forced to resign after she refused to retract her claim that development of the mine would attract black people. It was reported that Ms. Lizelle Strydom who uses the old South African flag as her Facebook profile picture said as follows "*We have no squatter camps here, but when the mines comes, the bantus will come.*"[56] Another member of WCEPA who opposes the mine according to the same media article is Mr. Jacques van der Westhuizen, a hotel owner who was reported to have said that the phosphate mine would threaten his "*constitutional right to live the lifestyle of our choice."*[57] According to the affidavit of Ms. Lawrence, Mr. van der Westhuizen is the vice-president of WCEPA.[58] The basis of the objections raised by Ms. Strydom, Ms. Lawrence and Mr. van der Westhuizen are in violation of section 9 (rights to equality) and 10 (rights to human dignity) of the constitution.

[47]. These published statements of both Ms. Strydom and Mr. van der Westhuizen are in violation of section 12 of the Promotion of Equality and Promotion of

[53] See pages 548 to 550 of the Appeal records.
[54] Discrimination means "any act or omission including a policy, law, rule or practice, condition or situation, which directly or indirectly affect (a) imposes burdens, obligations, disadvantages on; or (b) withhold, opportunities or advantages from any person or more of the prohibited grounds. See section 1 of the Promotion of Equality and Promotion of Unfair Discrimination Act 4 of 2000.
[55] See pages 683 to 686 of the Appeal records
[56] See page 684 of the Appeal records.
[57] Ibid.
[58] See page 543 of Appeal records.

Unfair Discrimination Act.[59] Ms. Lawrence stated this in her affidavit and repeated that during her testimony. Counsel for the appellant never put any questions during cross-examination of Ms. Lawrence to rebut these allegations. Save for the objections to this IWULA by both San-Parks,[60] and WWF,[61] the utterance of Ms. Strydom, Ms Lawrence and Mr. van der Westhuizen indicated that they were the only members of the neighboring community who have objected to this IWULA. There are no minutes nor attendance registers of any community meeting where it was resolved that the mining activity must be objected to based on environmental considerations. It is also surprising that Counsel for the appellant never called Ms. Carika van Zyl who relentlessly opposed the granting of the mining rights to Kropz to testify as factual witness in this matter. Ms. van Zyl attended some of this appeal hearings and Ms. Nicola Viljoen attended all the hearings of this appeal. She was also not called to testify as a factual witness. I also agree with the submission of Counsel for the third respondent that besides Ms. C. van Zyl and Ms. N. Viljoen, there is no other person from WCEPA as a non-governmental organisation who attended the appeal hearings.[62] San-Parks formerly withdrew its objection to the IWULA on 17 January 2017.[63] WWF did not follow-up on its objection to the IWULA.

[48]. On the other hand, the Tribunal has been provided with objective evidence that can be auditable regarding community member meetings which supported the mining operations by Kropz. Some of the meetings during which the mine was supported were held on the following dates:

(i) 19 July 2016 at 19:00. The Hopefield Community Forum held a meeting where the people present at the meeting supported the coming of Kropz mine operations into the area. There is an attendance register as well as minutes.[64] The resolution taken in this community meeting and the minutes

[59] Act 4 of 2000. Section 12. Prohibition of dissemination or publication of information that discriminates. No person may – (a) disseminate or broadcast any information (b) publish or display any advertisement or notice, that could be reasonably construed as or reasonably understood to demonstrate a clear intention to unfairly to discriminate against other person: (…).

[60] See page 140-175 of the Appeal records. See also page 3309 to 3317 of the RoD.

[61] See page 3320 to 3323 of the RoD.

[62] See page 13 of Kropz Heads of Argument.

[63] See page 3318 to 3319 of the Record of Decision.

[64] See page 703 to 706 of the Appeal records.

are very clear. The people support the mine. There is a comment which says *"The chairperson of Woba is a white woman from Aurora in the Sandveld. All members of Woba are white, no coloured people from Hopefield were approached."*[65] This statement confirms the racial comments made by Ms. Lizelle Strydom as articulated in paragraph 50 above.

(ii) 17 November 2017. The heading is Die Hopefield Gemeenskap Forum verwerp WOBA (as verteenwoordigend van die gemeenskap).[66] This meant that the Hopefield Community Forum rejects (WOBA), WCEPA, the appellant as the representative of the Hopefield Community in the litigation against Kropz. The community meeting of Hopefield Gemeenskap Forum has an attendance register as well as minutes.

[49]. **The status and the jurisdiction of the Water Tribunal.**

Section 148 of the NWA reads as follows regarding Appeals to Water Tribunal:

(1) There is an appeal to the Water Tribunal –

(f) subject to section 41(6), against a decision of a responsible authority on an application for a licence under section 41, or on any other person who has timeously lodged a written objection against the application.

[50]. The act states the following regarding the composition of the members of the Water Tribunal in terms of section 146 (3) to (5) of the NWA which reads as follows;

(3) The Tribunal consists of a chairperson, a deputy chairperson and as many additional members as the Minister considers necessary.

(4) Members of the Tribunal must have knowledge in law, engineering, water resource management or related fields of knowledge.

(5) The chairperson, the deputy chairperson, and the additional members of the Tribunal are appointed by the Minister on the recommendation of the Judicial Service Commission as contemplated in section 178 of the Constitution and the Water Research Commission established by section 2 of the Water Research Act, 1971.

[65] See page 705 of the Appeal records.
[66] See page 686 to 688 of the Appeal records.

[51]. The Water Tribunal was formed as a specialised forum to deal with water-related disputes that can be easily accessed and dispense justice to the affected and interested parties on an expeditious basis. It has been granted broad powers, and it is capacitated by people with special qualifications who are able to deal with the difficult process of approving water use licence applications. Cora Hoexter saliently posits the powers of the Water Tribunal by adopting a point of departure which locates the Water Tribunal as administrative appeals.[67] She said "Unlike judicial review, such appeals are established specially to challenge the merits of a particular decision. The person or body to whom the appeal is made will step into the shoes of the original decision-maker, as it were, and decide the matter anew."[68] This description of the administrative appeals by Hoexter C, is consonant to the provisions of section 146 (3-5) soritical to different qualifications and background required for people to be appointed as members of the Water Tribunal.

[52]. Prof Michael Kidd, meritoriously characterised the position and the powers of the Water Tribunal as follows: "In the absence of any other relevant provisions in the NWA (for example, provisions setting out the decisional powers of the tribunal), section 6 (3) of Schedule 6 would be sufficient authority for a conclusion that the appeal jurisdiction of the Water Tribunal is a so-called "wide appeal" which entails a complete rehearing and redetermination of the merits of the case with or without additional information"[69]

[53]. This unique feature of the Water Tribunal was also confirmed by Counsel for the appellant on 22 October 2019, by stating that the third respondent must furnish all the parties, especially the appellant, with the latest data and reports regarding the monitoring of the water levels at the mine pit so that the appellant can address the Tribunal with confidence since the Tribunal has the powers to accept new information in the matter in order to make a fair decision regarding the issuance of the IWUL to Kropz. Furthermore, the powers and jurisdiction of

[67] Hoexter C; Administrative Law in South Africa (2nd edition) (2021 edition) Juta at page 65.
[68] Ibid.
[69] Kidd M; Fairness Floating Down the Streams? The Water Tribunal and Administrative Justice (2012) 19 SAJELP (25) at page 27.

the Water Tribunal were also confirmed in the matter of Tikly v Johannes NO.[70] The Honourable Trollip J stated the following: “An appeal in the wide sense, or wide appeal, refers to a complete rehearing and redetermination on the merits of a case, with or without additional evidence or information. This means that the appellate body is not confined to the record of the body *a quo*.”[71]

[54]. This cogent articulation of the status and powers of the Water Tribunal, will then put to bed any legal submission which will suggest this panel cannot accept new information that would not have been submitted to the WUUUCA before the decision-maker decided to issue the IWUL to Kropz on 7 April 2017.[72] Hoexter C furthermore, crystalises the powers of this Tribunal by stating that: “The distinction becomes significant when the question arises whether an appellate body is entitled to correct illegalities committed by the administrator - in other words it allowed to review the decision as well as pronounce on its merits”[73].

[55]. The proceedings in the Water Tribunal have the status of a Magistrate Court;[74] hence the NWA stipulates that a litigant who is not satisfied with the decision of the Water Tribunal can appeal to the High Court. This unique status of the jurisdiction of the Tribunal was meritoriously articulated by the apex court in Barkhuizen *v Napier 2007 (5) SA 323 (CC)* at paragraph 55: '[*O]ur democratic order requires an orderly and fair resolution of disputes by Courts or other independent and impartial tribunals. This is fundamental to the stability of an orderly society. It is indeed vital to a society that, like ours, is founded on the rule of law. Section 34 gives expression to this foundational value by guaranteeing to everyone the right to seek the assistance of a Court. Section 34 therefore not only reflects the foundational values that underlie our constitutional order, it also constitutes public policy”*. I am now satisfied that any new information that was submitted by any parties to support its case will be accepted provided that the opposing party was given sufficient time and had

[70] 1963 (2) SA 588 (T) at 590F-591A.
[71] See also Rand Ropes (Pty) Ltd v Commissioner for Inland Revenue 1944 AD 142 at par.150.
[72] See page 3492 of RoD.
[73] See Hoexter C; Administrative Law in South Africa; supra at page 68.
[74] Section 149 (4) The appeal must be prosecuted as if it were an appeal from a Magistrate’s Court to a High Court.

access to the information before the party which is presenting any new information had provided all the parties with the new information so that the opposing parties can respond adequately, and so that fairness should prevail.

[56]. **Mr. Singh's temporary permission to Kropz 22 December 2016 through the lens of the Oudekraal Paradox**

Should Kropz have started the dewatering activities at the mine before the IWUL was approved, it would have committed an environmental crime. I must however indicate that by the time Kropz submitted its request to Mr. Singh to seek an approval for a temporary approval on 15 December 2016,[75] Kropz had already received an Environmental Authorisation for the installation of the Rotary Dreyer for the purpose of phosphate drying in the mining processing plant on 12 December 2016.[76] Of paramount importance is the approval letter from the DMR dated 12 December 2016 titled "Environmental Authorisations."[77]

[57]. The valediction of the approval letter reads as follows *"13. Recommendations" In view of the above, the NEMA principles, compliance with the conditions stipulated in this EA, and compliance with EMPr/closure plan, the competent authority is satisfied that the proposed listed activities will not conflict with the general objectives of the Integrated Environmental Management stipulated in Chapter 5 of NEMA, and that any potentially detrimental environmental impacts resulting from the listed activities can be mitigated to the acceptable levels. The authorisation is accordingly granted. Your interest in the future of the environment is appreciated.*"[78] These positive comments regarding Kropz' behavior was also echoed in the letter from Western Cape Nature dated 26 February 2016. It stated the following "EMM has since the inception of the mine proven to be environmentally aware and responsible. The CWCBR chooses to support EMM in their application as they have proven that they conduct their business in an environmentally responsible manner. (…) [A]ll precautions are taken to minimize the environmental impact, particularly with regards to the

[75] See pages 2641 to 2644 of the RoD
[76] See pages 2649-2650 of the RoD.
[77] See pages 2651-2666 of the RoD.
[78] See page 2666 of the RoD.

Geelbek Wetland."[79] The DMR further congratulated Kropz on 23 April 2015 for going an extra mile in practicing sustainable mining.[80]

[58] It is understandable that in the letter to Mr. Singh, Kropz lamented the fact that its mining projects was subjected to a litany of unmeritorious appeals that were also dismissed by different competent authorities, and this caused frustration on Kropz. The appeal by Ms. Corika van Zyl against the granting of a mining right to Kropz on 27 March 2015.[81] Kropz was further erroneously required to apply for a further Environmental authorisation by the Department of Environmental Affairs and Planning on 18 July 2016, even though Kropz was granted a mining right pursuant to a vigorous and onerous Integrated Environmental Impact Assessment.[82] I agree with the position alluded by Dr. Carstens from Kropz. The constitutional court in the Maccsand judgement pronounced that the DMR is the competent authority to issue environmental authorisations for mining activities.[83] It is surprising that the Western Cape Department of Environmental Affairs and Planning through its MEC was a third respondent in this matter. There is no legal opinion from a Senior Counsel that can trump the decision of the constitutional court. I abhor the frustration that a company like Kropz should be subjected to this unlawful treatment.[84]

[59]. The temporary authorisation issued to Kropz by Mr. Anil Singh, the Deputy Director-General on 22 December 2016 is not covered by any section of Nema, nor any section of the National Water Act 36 of 1998.[85] It was accurately submitted by Counsel for the appellant that the "so-called provisional permission" granted to Kropz by Mr. Singh dated 22nd December 2016,[86] was labelled as questionable by a panel of this Tribunal chaired by Professor Murombo.[87] The ruling by Professor Murombo in this matter was primarily

[79] See pages 1202 to 1203 of the RoD.
[80] See page 3266.
[81] See page 3209 of the RoD
[82] Se e page 2029 of the RoD.
[83] See Maccsand v City of Cape Town & Others 2012(4) SA 181 CC at para 11. This position was also buttressed by Kotzé LJ; Improving unsustainable environmental governance in South Africa: The Case for Holistic Governance. (2006) (1) PER at page 9.
[84] See the correspondence from the DEAP dated 18 July 2016 on pages3255 to 3257 of the RoD.
[85] See page 55 of the appellant's heads of argument.
[86] See pages 3587 to 3590 of the RoD vol 15.
[87] See paragraphs 6, 27 and 36.5 of the ruling handed down on the 20 November 2017.

regarding the *locus standi* of the appellant based on the fact that the appellant served the appeal papers on Kropz two days after the expiry of the 30 days period to file the appeal.[88]

[60]. The issue of the provisional permission was more of an *obiter dictum* than a *ratio decidendi* in the ruling of Professor Murombo. Counsel for the appellant had committed on 23 October and 13 December 2019, to provide the office of the Registrar of the Tribunal with the names of the officials at the department, that she felt would be of assistance in this matter. On Friday 13 December 2019, Counsel for the appellant went on record and stated the following: "*I will certainly communicate those names to Mr. Mabe, then on Tuesday and copying everyone*". This commitment was not followed through. The explanation that Counsel for the appellant gave on 2 February 2021 for not providing the Registrar of the Tribunal with names of the officials was that she did not want to burden the appellant as an NGO with the travelling and accommodation costs of the officials to be summoned to the hearing.

[61]. This submission by Counsel for the appellant is not legally sustainable. The Water Tribunal has the powers to hear matters anywhere in the country.[89] This matter was heard for six days in Cape Town on 10 to 12 December 2019 and on 10 to 12 February 2020. The appellant would not incur any costs because the hearing would be congregated wherever the witnesses (Department officials) are based.

[62]. Mr. Singh's granting of the temporary permission to Kropz was an administrative action as defined in section 1 of the Promotion of Access to Just Administration (PAJA)[90]. It is trite that an unlawful administrative action, remains binding and enforceable until it is set aside by a competent court. But for the granting of the "temporary permission" by Mr. Singh to Kropz, Kropz would have been subjected to the provisions of section 24G of Nema. Mr. Singh was not summoned to the hearing so that he could be cross examined

[88] See paragraph 45.1 of the ruling handed down on the 20 November 2017.
[89] Section 148(2) The Tribunal is an independent body which – (a) has jurisdiction in all the provinces of the Republic; and (b) may conduct hearing anywhere in the Republic.
[90] Act 33 of 2000.

regarding his issuance of the temporary permission to Kropz. It was the duty of the appellant to submit the name of Mr. Singh to the Registrar of the Tribunal.

[63]. The Supreme Court of Appeal in the well-traversed judgement of Oudekraal Estates (Pty) Ltd v City of Cape Town,[91] said the following regarding an invalid administrative act: "For those reasons it is clear, in our view, that the Administrator's permission was unlawful and invalid at the outset (…) [B]ut the question that arises is what consequences follow from the conclusion that the Administrator acted unlawfully. (…) [U]ntil the Administrator's approval (and thus also the consequences of the approval) is set aside by a court in proceedings for judicial review it exists in fact, and it has legal consequences that cannot simply be overlooked. The proper functioning of a modern State would be considerably compromised if all administrative acts could be given effect to or ignored depending upon the view the subject takes of the validity of the act in question. No doubt, it is for this reason that our law has always recognised that even an unlawful administrative act is capable of producing legally valid consequences for so long as the unlawful act is not set aside".[92]

[64]. The apex court confirmed the accuracy of this principle in Merafong City Local Municipality v AngloGold Ashanti Limited.[93] Writing for the majority judgement, Cameron J said the following in paragraph 36. "Hence the central conundrum of Oudekraal, that "an unlawful act can produce legally effective consequences",[94] is constitutionally sustainable, and indeed necessary. This is because, unless challenged by the right challenger in the right proceedings,[95] an unlawful act is not void or non-existent, but exists as a fact and may provide the basis for lawful acts pursuant to it."[96] The Oudekraal principle was again applied by the Constitutional Court in Economic Freedom Fighters v Speaker, National Assembly and Others.[97] In paragraph 74 the court stated that "that

[91] [2004] 3 All SA 1 (SCA) at paragraph 26.
[92] See Oudekraal Estates (Pty) Ltd v City of Cape Town [2004] 3 All SA 1 (SCA) at paragraph 26.
[93] [2016] ZACC 35 at paragraph 36.
[94] Oudekraal above n 37 at para 27.
[95] Oudekraal above n 37 at para 35.
[96] As Forsyth puts it, "some 'functional voidability' of invalid administrative action is thus implied by section 172: an invalid administrative act will be effective until any judicial-set period of suspension has come to an end". Forsyth "The Theory of the Second Actor Revisited" (2006) Acta Juridica 209 at 228.
[97] 2016 (3) SA 580 (CC).

administrative decisions may not simply be ignored 'without recourse to a court of law' as that would 'amount to a licence to self-help' and indeed a recipe for anarchy."[98] The decision by Mr. Singh to grant Kropz a temporary permission was never set aside by any competent court, and it was therefore effective until it was superseded by the granting of the IWUL to Kropz on 7 April 2017.

[65]. Section 7 of Schedule 6 of the NWA read with Rule12 of the Tribunal Rules states the following.

SUBPOENAS AND EVIDENCE

(1) The Water Tribunal may—

(a) subpoena for questioning any person who may be able to give information relevant to any of the issues; or

(b) subpoena any person who is believed to have possession or control of any book, document, or object relevant to any issue, to appear before the Tribunal and to produce that book, document, or object.[99] I could not issue the necessary summonses if I were not provided by the appellant with a formal request that includes the names of the officials.

[66]. It is worth mentioning that Counsel for the appellant asked questions to Mr. Dreyer the only factual witness of the first and second respondents regarding the issue of the "temporary permission" granted by Mr. Singh to Kropz during cross-examination. For obvious reasons, Mr. Dreyer could not answer such question regarding the granting of the "temporary permission" to Kropz by Mr. Singh. It was unfair for Counsel for the appellant to ask such a question to Mr. Dreyer, whereas the temporary permission was granted by Mr. Singh. Mr. Dreyer would be speculating had he attempted to answer the question relating to the "temporary permission" granted to Kropz by Mr. Singh. His attempt to answer this question would have been tantamount to hear-say.

[98] See also Moleya NI; The effect of the Oudekraal principle on the rule of law (01.08.2018) ttps://www.researchgate.net/publication/330396200, on page 6.

[99] See Government Gazette No. No. 28060 dated 23 September 2005.

[67]. **<u>The One Environmental System in the Extractive Industry</u>**.

The One Environmental System (OES) is an agreement in terms of S 50 A (2) of NEMA and S 163 of NWA, between the Ministers in the DEA, DMR and DWS with respect to mining. It stated that NEMA is the principal Act in terms of which all the environment related aspects would be regulated; and the DMR will be the Competent Authority to issue environmental authorisations relating to all the mining activities and that DEA will be the appeal authority in relation to these authorisations. These departments agreed to synchronise and fix their periods for the approval of mining licenses to 300 days and that should there be an appeal it should disposed of within 90 days. It was introduced to eliminate the duplication of processes that were fragmented between the three departments as required by the relevant provisions of NEMA, MPRDA and NWA.[100] DEA announced the "8 December 2014", as the implementation date of the OES, whereas the Act, which introduced it being the National Environmental Management Law Amendment Act,[101] (NEMLAA), commenced on 2 September 2014.

[68] I have no option but to cite my own dissertation for my master's degree in Extractive Industries in Africa.[102] The department of Water and Sanitation introduced the OES in terms of section 30 of the National Water Amendment Act.[103]

The OES was introduced for to the following reasons:

- ❖ To eliminate the duplication of processes that are fragmented as required by the relevant provisions of NEMA,[104] the National Water Act (NWA),[105] and the Minerals and Petroleum Resources Development Act (MPRDA);[106]
- ❖ To introduce an integrated permitting system with a view to create legal certainty in the industry regarding the approval process for a mining license.[107] SA mining industry is suffering from regulatory duplication.

[100] Maake N; Towards a One Environmental System in the Extractive. See Towards a One Environmental System in the Extractive ...https://repository.up.ac.za › handle at age 4.
[101] Act 25 of 2014
[102] Maake N; Towards a One Environmental System in the Extractive. supra at pages 10 to 11.
[103] 27 of 2014.
[104] NEMA 107 of 1998
[105] Act 36 of 1998.
[106] Act 28 of 2002
[107] Jeffery A; Finding the right balance between mining and the environment (IRR 2018) 3.38) 5.

> "Regulatory overlap between various government departments (often Energy/Resources/Mining and Environment) may result in unclear lines of authority (…). Regulatory overlap (…) [i]s a significant investment deterrent.[108]

[69]. Kropz was issued a mining right during the transitional period just before the introduction of the One Environmental System. The complication that manifested was caused by the interplay and the interchange use of words in NEMA and MPRDA. It caused a lot of confusing amongst the deferent industry players. Even before the Minister of Environmental Affairs introduced the One Environmental System, the constitutional court in the Maccsand judgement had already pronounced that the DMR is the competent authority to issue the environmental authorisations for all the mining activities.[109] Although this decision did not seat well with a lot of industry players in the extractive industry like environmentalists, it is the true reflection of the legal system in the country.[110]

Facts before the Tribunal

Procedural Grounds of appeal.

2.3. The decision was premature and in contravention of section 41 (5) of the national Water Act, 36 of 1998;

2.4. The decision-making process was procedurally unfair.[111]

[70]. Because of the chronological sequences of events in the granting of the WUL, I will start with Kropz application for a mining right. Kropz was granted a mining right in terms of section 23(1) of the Mineral Petroleum Resources Development Act 28 of 2002 on 26 November 2014 by the Department of Mineral Resources over Portions 2 and 4 of the Farm Elandsfontein 349. The mining right was granted to Kropz for the mining activities to extract phosphate.

[108] Vivoda V; Determinants of Foreign Direct Investment in the Mining Industry (CSRMSMI 2017) 25.
[109] Maccsand v City of Cape Town & Others 2012 (4) at paragraph 12.
[110] Musodza WJT; The One Environmental System: Did we get it right?
LLM Dissertation. See
https://wiredspace.wits.ac.za/bitstream/handle/10539/26814/The%20One%20Environmental%20System.pdf?sequence=1. Page 39.
[111] See page 2 of the Appeal records.

Kropz embarked on a vigorous Integrated Environmental Impact Assessment as per the provisions of the National Environmental Act 108 of 1997.[112] It is trite that the standards and requirements for an Integrated Environmental Impact Assessment,[113] that must be met are more stringent than the requirements in terms of the National Water Act, which is a Specific Environmental Management Act (SEMA). This fact was acknowledged by Counsel for the appellant.[114]

[71] The former attorneys of record of the appellant, Cullinan & Associates, stated the following on a facebook message that appears on pages 689 to 698, and titled Defend the Elandsfontein acquifer from illegal strip mining "*We are pleased to provide legal assistance to the West Coast Environment Protection Association in challenging the legality of decisions by the Department of Mineral Resources and ensuring both the DMR and Elandsfontein Exploration and Mining act in accordance with the law. We are concerned that, once again, it seems that due process was not followed in the granting of a mining right."*[115]

[72]. I do not agree with this statement. The DMR directed Kropz to embark on an Integraded Enviromental Impact Assessment and there is a plethora of evidence in the pleading documents as well as the oral evidence of the experts witnesses and Ms. Lawrence, the factual witness of Kropz. The constitutional court clarified the issue regarding the competent authority in the well traversed judgement of Maccsand (Pty) Ltd v City of Cape Town and Others,[116] by stating the following on paragraph 12 "When listing activities, the Minister for Water Affairs and Environment must identify the competent authority responsible for granting environmental authorisation in respect of each listed activity. (…) [S]ection 24C prescribes that the Minister for Mineral Resources be identified as the competent authority where an activity constitutes mining or a related activity occurring within mining.This means that it is only the Minister for Mineral

[112] Appeal records 428 para 6. Also RoD pages 3441-3490.
[113] Section 2(4) (b) of NEAM states that "Environmental management must be integrated, acknowledging that all elements of the environment are linked and interrelated, and it must take into account the effects of decisions on all aspects of the environment and all people in the environment by pursuing the selection of the best practicable environmental option".
[114] Appellant Heads of Argument para 15 page 8.
[115] See page 693 of the Appeal record.
[116] 2012 (4) SA 181 (CC).

Resources who is competent to grant authorisations in respect of these activities".

[73] Kotze L; said the "The Mineral and Petroleum Resources Development Act 28 of 2002 is applicable to mineral and petroleum resources and provides for authorisation of mining activities that may affect water resources; approval of environmental management programmes and plans relating to mining activities; reconnaissance permissions; prospecting rights; mining rights; environmental impact assessments (hereafter EIA) relating to mining activities; and authorisation of mining activities in certain areas such as national parks."[117] There should therefore not be any doubt that the Integrated Environmental Impact Assesment that was conducted by Kropz extensively took into account all the possible impacts on the water resources flowing from the mining activies, and the mitigation measures were also investigated to the satisfaction of both the Department of Environmental Affairs (as it was then called) and the Department of Mineral Resources before the latter could grant Kropz a mining right.

[74]. The need for an Integrated Environmental Impact Assessment was identified as one of the critical paths to alleviate the problem of duplicated and confusing processes which mining companies must comply with to obtain approvals for mining rights and water use licenses. These duplicated processes manifested into both legal and policy uncertainty in the extractive industry and all sectors of the economy in the country. According to Fuggle R F,[118] "Integrated Environmental Management (IEM) is a systematic approach developed for ensuring the structured inclusion of environmental considerations in decision-making at all stages of the development process.

[75]. The objective of IEM is not to impede development, but to provide an effective approach, using interactive and interactive evaluation techniques, to improve a

[117] Kotzé LJ; Improving unsustainable environmental governance in South Africa: The Case for Holistic Governance. (2006) (1) PER at page 9.
[118] Fuggle RF; (1990) Integrated Environmental Management: An Appropriate Approach to Environmental Concerns. 8:1-2, 29-45, DOI: 10.1080/07349165.1990.9726027 at page 30.
in Developing Countries

proposal, or suggest more environmentally acceptable ways of meeting the purpose and need of a development proposal. This enables the responsible authority to identify those actions which are in the best overall interests of society without jeopardising the project as a whole". Distinctive to South Africa, Fuggle further stated that these problems will be addressed by adopting a four-stage procedure termed Integrated Environmental Management". He concluded, among others, by stating that "Integrated Environmental Management seeks to introduce environmental concerns into development actions by integrating them fully with planning and management. It seeks to reduce the anti-development perception of EIA which exists in the developing countries of southern Africa, and possibly further afield."[119] I have no doubt that the Department of Mineral Resources applied this integrated method of evaluating the possible environmental risks and the mitigation measures thereof when they granted Kropz the mining right on 26 November 2014.

[76]. Kropz then applied for an IWUL on 26 February 2016, which application was approved by the Director-General of the Department of Water Affairs on 7 April 2017, pursuant to a Record of Recommendation by the WUUUAC which supported the issuance of the IWUL.[120] One of the grounds of appeal on a procedural basis is that "2.4. The decision-making process was procedurally unfair."[121] The appellant alleged that Kropz did not embark on a public participation process and consequently I&APs were not afforded a formal opportunity to participate effectively. The interests and needs of all I&APs were not considered. The appellant submitted to the panel that it was expecting to be invited to participate in a public participation programme solely for the purposes of the IWUL. The appellant further claimed that "17.EEM did not conduct a public participation process during the IWULA process (and the DWS did not direct it to do so) despite having advised members of the public that water issues would not be addressed during the mining permit application process because I&APs would have an opportunity to participate on water issues during the IWULA process."[122] Counsel for the appellant never led any

[119] Fuggle RF; supra at page 44.
[120] Appeal records 428 para 7.
[121] See page 2 of the Appeal records.
[122] See page 8, paragraph 17.

factual witness who would have been misled by Kropz' consultants during the public participation for the mining right.

[77] It is an indubitable fact that Ms. Carika van Zyl has been inexorably opposing the mine at Elandsfontein farm. Kropz' factual witness Ms. Lawrence testified that Ms. van Zyl attended the public participation meetings for the Integrated Environmental Impact Assessment for the purpose of this mine. This was before WCEPA was formed.[123] She attended a formal meeting on 19 September 2014. The purpose of the meeting: 5th Elandsfontein Groundwater Study Steering Committee Meeting. She appeared on the attendance register as Independent Conservation Consultant. Her signature appears on page 217 of the RoD. The meeting was solely about the possible impact of the mining activities on the water resources.[124] Ms. van Zyl even lodged an appeal against the granting of the mining right to Kropz, which appeal was dismissed by the DMR on 14 December 2017.[125] She attended some of the 13 hearings in this matter, and surprisingly, Counsel for the appellant did not call her or any member of WCEPA to come and testify in support of these allegations against Kropz and its consultant. These uncorroborated allegations by the appellant that its members were misinformed about the calling of another public participation process for the IWULA failed to meet the requirement of one of the well-established legal principles of *"He who alleges must prove".* The appellant's submission that its members were unduly deprived of taking part in the public participation process for the IWULA is misguided and legally flawed.

[78]. King P & Reddell C[126], quoting the approval of Hoexter C[127], say the following regarding the calling of public participation by an organ of state: *"While section 3 of the PAJA sets out the requirements for procedural fairness of administrative action affecting "any person", section 4 of the PAJA introduces an innovative feature into South African administrative law in that it is specifically concerned with administrative action affecting members of the*

[123] See page 29 of Kropz Heads of Arguments.
[124] See pages 213 to 250 of the Record of Decision.
[125] See page 444 of the Appeal records.
[126] Public Participation and Water use Rights PER 2015(18)4 at page 945 to 946.
[127] Hoexter C Administrative Law; supra at page 407

public. Section 4(1) provides that where administrative action materially and adversely affects the rights of the public, an administrator must decide whether: *(a) to hold a public inquiry in terms of subsection (2); (…) [I]f it is reasonable and justifiable in the circumstances; an administrator may depart from the requirements of section 4(1). For administrative action to materially and adversely affect the rights of the public (in which case section 4 is applicable), it must have a general and significant public effect, and the rights of members of the public must be at issue. To have a general effect, administrative action must apply to members of the public equally and impersonally.11 Examples of administrative action affecting the public could include an increase in the cost of bus or train fares, a decision to build a power plant, or a decision to rezone land.12" Section 4 of the PAJA leaves the choice of participation process up to the administrator (although the administrator is mandated to choose one of the procedures set out therein)".* King and Reddell *further stated that "An administrator may depart from the requirements of ss 3 and 4 of PAJA, however, if it is reasonable and justifiable in the circumstances (as set out in ss 3(4) and 4(4)(a))."*[128]

[79]. This authoritative source by King and Reddell is consonant to the testimony of Ms. Lawrence, the factual witness of Kropz. She unambiguously testified that the public participation process for the Environmental Impact Assessment was vigorous and intensive and included the impact of mining activities on the water resources. She indicated that it was the decision of the Western Cape Regional Office of the Department of Water and Sanitation not to direct Kropz, the applicant for an IWUL not to embark on another public participation process during the IWULA assessment. Such a decision by the Department of Water and Sanitation was in line with the provision of section 4 of the Promotion of Access to Just Administrative Act, as per the sapiential articulation of King and Reddell espoused in paragraph 77 above. According to the answering affidavit of Ms. Lawrence, the Western Cape Regional office of the Department of Water and Sanitation was part of the founder members of the Water Working Group together with Kropz. Its decision not to request Kropz to call for a second round of public participation process is understandable.

[128] King P & Reddell C; Public Participation and Water use Rights; supra at page 946.

[80]. Ms. Lawrence cogently unpacked the public participation programme that was followed during the Integrated Environmental Impact Assessment for the purpose of obtaining the mining right.[129] Her affidavit clearly indicates the names of the Interested and Affected Parties.[130] Although all affected stakeholders should be treated equally, it is noteworthy to indicate that one of the stakeholders by the name of Saldanha Bay Water Quality Forum Trust (SBWQFT) and the Saldanha Bay Municipality did not object to the issuance of this IWUL and are also members of the Water Monitoring Committee.[131] One of the Mission statement of the SBWQFT reads as follows "To promote water quality and ecological system health through: Scientific monitoring, evaluating and reporting. One of its Principles reads thus "Scientific Approach-monitor, evaluate and report."[132]

[81] The SBWQFT also procured the services of an external environmental service supplier company who confirmed the adequacy of the information that Kropz submitted as part of its WULA by stating the following" While it has been established from a ground assessment undertaken by Julian Conrad of Geohydrological and Spatial Solutions International (Pty)Ltd that the proposed mining operations are highly unlikely to have any impact on the ground water flow, Elandsfontein Mine have opted to take a precautionary approach and would like to expand the existing State of the Bay monitoring activities undertaken by the SBWQFT to establish an appropriate baseline against which any potential future changes in the Lagoon can be benchmarked." The report further stated that "The resolution on these images is high enough to map reed distribution accurately when coupled with some limited ground truthing. These high-resolution images will reportedly be available on an annual basis in future and can thus be used to track any future challenges in reed distribution or extent, and hence potential changes in groundwater flux. An effort will be made to link any changes in reed distribution which data on rainfall and ground water

[129] Appeal records page 443-445.
[130] Appeal records page 476.
[131] Appeal records page 484.
[132] See https://sbwqft.org.za/about-sbwqft/

flow rates from monitoring boreholes in the area, as well as to changes in water quality in the lagoon and to changes in the macrobenthos assemblages."[133]

[82] The SBWQFT is a very credible and an important stakeholder in the Water quality assessment and yet it did not object the issuance of this WULA, instead, it supported the WULA from Kropz and it even offered some suggestion on how to mitigate any possible water pollution around the Lagoon due to the activities of the mine. It is now common cause that San Parks withdrew its objections, ostensibly after Kropz has addressed their concerns. WWF did not pursue its objection and went quiet. The testimony of Ms. Lawrence is unrebutted on this aspect and accordingly should prevail.

[83]. The appellant further submitted that first and second respondents should have directed Kropz to conduct a public participation process in terms of section 24 (5) and section 44 of the NEM and the Regulations promulgated in terms thereof, including the 2014 Environmental Impact Assessment Regulation GNR 982 of 4 December 2014.[134] Section 24(5) of NEMA was substituted by section 5 (e) of the National Environmental Management Laws Amendment Act (NEMLAA),[135] which came into operation on 2 September 2014.

[84]. At that time Kropz' Intergraded Environmental Impact Assessment which was conducted in terms of section 23 of NEMA was at an advanced stage. Braaf Environmental Consultants submitted the final EIA report and the Environmental Impact Assessment Plan (EIMP) on 17 September 2014, on behalf of Kropz.[136] Kropz' final EIA report and EIMP was approved on 15 February 2015.[137] It would have been unconstitutional, to expect Kropz to comply with the provisions of NEMLAA legislation that was promulgated on 3 September 2014, just 14 days before Kropz was to submit its final EIA report and EIMP[138]. The appellant further submitted that Kropz failed to comply with

[133] See page 62 to 63 of Annexure "B". Report from Anchor Environmental dated 9 September 2015 addressed to Mr. Christo van Wyk; Chairman of SBWQFT.
[134] See paragraph 76 on page 29 and 30 of the Appeal records.
[135] Act 25 of 2014.
[136] See page 443 of the Appeal records.
[137] See page 445 of the Appeal records
[138] See paragraph 42 on page 345-344 of appeal records.

the provisions of section 24 L of NEMA, in that Kropz did not implement the alignment of environmental authorisations as provided in section 24 L. This alignment of environmental authorisations was introduced by NEMLAA. This submission by the appellant that Kropz must comply NEMLAA is at the very least, absurd. Legislation in South Africa do not apply with retrospective effect.

[85]. I am in consonant to the submission of Kropz soritical to the issue relating to the competent authority to issue environmental authorisations for mining activities. On page 347 of the appeal records, Kropz accurately quoted paragraph 22 of the apex court judgement the Maccsand v City of Cape Town and Others[139], which stated as follows "Section 24 C prescribes that the Minister for Mineral Resources be identified as the competent authority where an activity constitutes mining or a related activity occurring within mining."[140] I also agree with Kropz' submission as per the legal opinion procured from Adv. Grobler SC which confirmed that Kropz' application for a mining right was submitted during a transitional period regarding the promulgation of new MPRDA regulations that would repeal the current MPRDA regulations. Applications that were submitted during the recently repealed MPRDA regulations, would be assessed according to the requirements of recently repealed regulations as if the repealed regulations were still applicable.[141] This interpretation of the convoluted MPRDS regulations by Adv. Grobler SC is sapiential. It is a distinctive error in law by the appellant to submit that Kropz' application for a mining right and the associated integrated Environmental Impact Assessment must comply with any legislation and regulations that were promulgated for the purposes of introducing the One Environmental System in the extractive industries in South Africa.

[86]. The Integrated Environmental Impact Assessment which Kropz embarked on is compliant to the provisions and objectives of section 23 of NEMA. Section 23(1) of NEMA states that "The purpose of this Chapter is to promote the application of appropriate environmental management tools in order to ensure

[139] 2012(4) SA 181 CC at paragraph 22.
[140] See Maake N; One Environmental Environment dissertation supra; at page
[141] See page 349 to 350 of the appeal records.

the integrated environmental management of activities" section 23(2) states that the general objective of integrated environmental management is to:

(a) promote the integration of the principles of environmental management set out in section 2 into the making of all decisions which may have a significant effect on the environment;

(b) identify, predict, and evaluate the actual and potential impact on the environment, socioeconomic conditions and cultural heritage, the risks and consequences and alternatives and options for mitigation of activities, with a view to minimising negative impacts, maximizing benefits, and promoting compliance with the principles of environmental management set out in section 2;

(c) ensure adequate and appropriate opportunity for public participation in decisions that may affect the environment;

(d) identify and employ the modes of environmental management best suited to ensuring that a particular activity is pursued in accordance with the principles of environmental management set out in section 2.

[87]. The section 2 that is mentioned in this section (section 23) refers to NEMA principles which are, among others, to serve the following critical roles:

(e) serve as the general framework within which environmental management and implementation plans must be formulated;

(f) serve as guidelines by reference to which any organ of state must exercise any function when taking any decision in terms of this Act or any statutory provision concerning the protection of the environment;

(g) guide the interpretation, administration and implementation of this Act, and any other law concerned with the protection or management of the environment.

Section 2(3) of NEMA, the NEMA principles, states that "Development must be socially, environmentally and economically sustainable".

[88]. Ms. Lawrence's affidavit and her almost not assailed testimony is consonant with the principles and guidelines that are set out in sections 2 (NEMA Principles) and 23 (Integrated Environmental Impact Assessment) of the National Environmental Management Act. Miss Lawrence stated that Kropz'

environmental authorisation was issued by the competent authority being the Regional Director of the Department of Mineral Resources on 12 December 2016. On 1 February 2017, the Provincial Department of Environmental Affairs and Planning appealed against the granting of the environmental authorisation was issued on 12 December 2016 in terms of section 43(1) of NEMA. The appeal was ultimately dismissed by the NEMA appeal authority at the National Department of Environmental Affairs in May 2017.[142] This fact was never assailed by Counsel for the appellant.

[89]. The fact that the appeal filed by the Provincial Department of Environmental Affairs and Planning was dismissed by the NEMA appeal authority authenticated the robustness of the Integrated Environmental Impact Assessment that was conducted by Kropz. The decision by the NEMA appeal authority certainly confirms the fact that the Integrated Environmental Impact Assessment that Kropz embarked upon conforms to the NEMA principles. It was a correct decision by the Department of Water and Sanitation not to direct Kropz to embark on another public participation process. For the reason stated above, the appeal ground regarding the procedural unfairness of granting this IWUL to Kropz fails and is therefore dismissed.

[90] **Substantive Grounds of appeal as follows:**

2.1. The water use licence application should have been refused on the basis of available information;[143]

2.2. The information before the decision-maker was insufficient for granting a water use licence;[144]

2.3. The decision-maker failed to be guided by the precautionary principle and public trust doctrine;[145] and

2.4. The decision-maker and its delegated functionaries conducted themselves in a manner creating a reasonable apprehension of bias.[146]

[142] See page 448 of the Appeal records.
[143] See page 2 of the Appeal records.
[144] Ibid.
[145] See page 3 of the Appeal records.
[146] Ibid.

[91]. For the benefit of the readers of this judgement I provide a summary of the operation of the mine and then deal with the testimony of the experts and factual witnesses, respectively. Elandsfontein Exploration and Mining (Pty) Ltd (EEM), proposes to mine phosphate on the Cape West Coast. EEM has applied for a mining right for its proposed Elandsfontein Mine in terms of Section 22 of the Mineral and Petroleum Resources Development Act No. 28 of 2002 (MPRDA) for a proposed strip mine that will include the farm Elandsfontein 349 Portions 2 and 4.

The phosphate occurs within a sedimentary deposit and is below the groundwater table. To be able to mine safely the open pit mining area will need to be dewatered by means of artificial recharge. The indicated resource at Elandsfontein is 78Mt, at a grade of 10.1% P2O5.

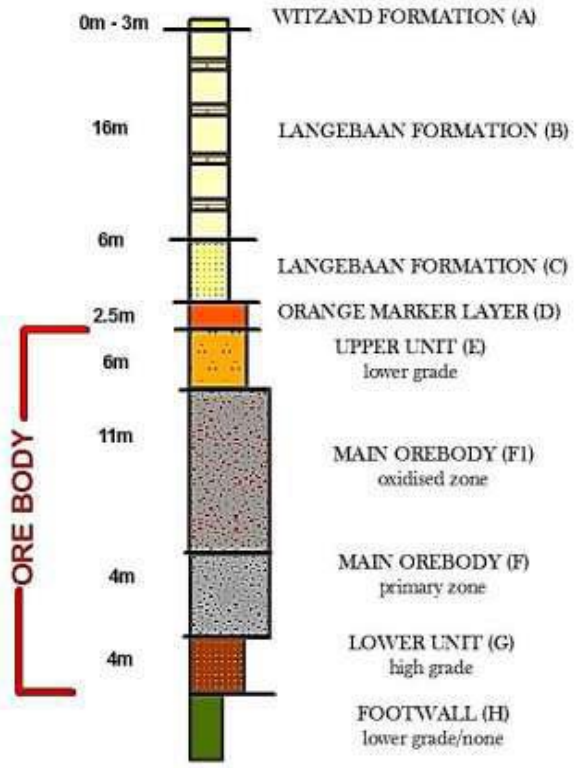
[92]. Due to the shallow, sandy, and uniform nature of the deposit, only surface mining methods were considered. No drilling or blasting is required. The phosphate occurs within a sedimentary deposit and is below the groundwater table. To be able to mine safely the open pit mining area will need to be dewatered by means of artificial recharge. Several surface mining methods were investigated, and strip mining has been selected as the preferred option, based primarily on environmental considerations. The strip mining will reduce the overall mining footprint and allow for continuous rehabilitation of the mining area. Upon mine closure, the majority of the mine area would have already been returned to its original status. As the mining activities intersect the upper Elandsfontein aquifer, continuous perimeter borehole pumping will be required to remove the excess water from the mining strips. distribution hub, minimising the exposure of water to atmospheric conditions. In order to be able to mine safely the open pit mining area will need to be dewatered by means of artificial recharge. The proposed Elandsfontein mine is situated 15 km east of Langebaan. Geographically, Langebaan is approximately 100 km north of Cape Town. The proposed mine area is situated in quaternary catchment G10M of the Berg Olifants Water Management Area.[147]

[147] See pages 3409 to 3410 of the RoD.


18°0'0"E
18°30'0"E
33°0'0"S
Velddrif
Lower Berg
River Valley
Saldanha
Langebaan
Hopefield
GEOSS
LEGEND
Elandsfontein mine area
Quaternary catchment (G10M)
Towns
Roads
Rivers
0 5 10
Kilometers

[93]. **Mining method**

Mining Method DBCM



Strip mining has been selected as the preferred mining method, to allow continuous rehabilitation of the area, that would commence three years after mining has commenced. The surficial, lateral expanse and massive nature of the Elandsfontein deposit makes it suitable for open-pit mining methods. It has a typical tabular type of mineralised zone that is covered by soft sand, sandy topsoil and vegetation typical to the region. In this mining method, the following activities are executed:

(i) The land is cleared; topsoil is removed and stockpiled at designated sites for use in future land rehabilitation. Depending on the extent of the base of weathering, any further waste or ore that can be removed by free-digging is removed and stockpiled accordingly. The topsoil is to be used as a berm around the pit to prevent water flow into the pit and to minimise transportation costs;

(ii) In a number of cyclic processes the waste and/or mineralised material is excavated, hauled and dumped in designated sites;

(iii) At strategically planned periods the waste around the boundary of the pit is removed in order to mine out deeper ore.[148]

[148] See pages 3414 to 3415 of the RoD.

[94] **Water Uses Applied for in terms of section 21 of the National Water Act.**

Kropz applied for the following water uses for the purposes of operating its mine.[149]

Section 21(a).

Taking water from open pit for mining purposes. For this purpose, Kropz required 946 080 m3/a.[150] This water use is the focus issue in this appeal matter.

Section 21(c) and (i).

Construction of an open pit on an unnamed tributary. To continue mining and to access phosphate. For this purpose, Kropz requires Approximately 10 to 15 Ha of land.

Section 21(e).

Re-injection – artificial aquifer recharge 36 Boreholes. For the purposes of disposal of excess water. For this purpose, Kropz requires 11 826 000 m3/for the first year.[151] 7 095 600 m3/a for the second year. 5 518 800 m3/a until the end of the operation. This water use application is the focus issue in this appeal.

Section 21(g).

Disposing of waste in a manner which may detrimentally impact on a water source. The purpose is over button soft stockpile, phosphate sands mining overburden, softs stockpile, polluted stormwater system and waste dock dump. 15 150 000 m3 to be disposed of.

[95]. Disposing process water in two Elandsfontein plant process water dam HDPE lined earthen dam. This is for the purpose of water recovery and reuse. For this purpose, Kropz requires 6000 m3. For the purpose of Plant stormwater dam, Kropz requires 6000 m3. For the purpose of soft stockpile stormwater dam, Kropz requires 30 000 m3.

[149] See pages 3454 to 3455 of the RoD.
[150] See page 3418 of the RoD.
[151] Ibid.

Backfilling of the mined area softs for the purposes of rehabilitating the mined pit. Kropz will require approximately 10 to 15 hectares of over button with the moisture content of 4% and process tailings with the moisture content of 16% combined moisture content of six to seven percentages.

Section 21(j).

Removing discharging or disposing of water found. for the purposes of continuation of the mine. Kropz requires 946 080 m3/a = 2 592 m3/d.

Removing discharging or disposing of water found. for the purposes of continuation of the mine. Kropz requires 11 826 000 m3/a for the first year. 7 095 600 m3/a for the second year. 5 518 800 m3/a until the end of the operations.

[96]. Due to the complexity of the WULA, there were a plethora of correspondences between Kropz (Braff the consultant) and several officials in the Western Cape Region of the Department of Water and Sanitations, Western Cape DEAP, SAN-Parks, Saldanha Bay Water Quality Forum Trust,[152] as well as the Saldanha Municipality as the local government where the Kropz mine will be operated. The purposes of these correspondences were amongst others to seek outstanding or additional information from Kropz the applicant and to seek clarity from Kropz or Braaf the consultant.

[97]. The one issue that haunted this application was the interplay between the MPRDA and NEMA and the nostalgic behaviour of some official in the Western Cape DEAP in accepting that the DMR is the competent authority to issue environmental authorisations for mining activities in South Africa. These nostalgic behaviour on the side of DEAP officials continued despite the fact that the constitutional court in the Maccsand v City of Cape Town & Others clearly pronounced that the DMR is the competent authority to issue environmental authorisations in the mining industry, subject to positive comments from the Department of Environmental Affairs which must confirm that all the

[152] See paragraphs 80-82 above regarding the comment and support for Kropz WULA by SBWQFT.

environmental risk that would have been triggered by the listed activities would have been adequately mitigated.[153]

[98]. The first and the second substantive ground of appeal in this matter reads as follows:

2.1. The water use licence application should have been refused on the basis of available information.

2.2. The information before the decision-maker was insufficient for granting a water use licence.[154]

A proper reading and analysis of these grounds of appeal creates an impression that the IWULA of Kropz was decided harshly and without paying attention to details. I disavow these statements. Amongst the plethora of correspondences exchanged between Kropz and officials within the Department of Water and Sanitation (DWS), the DWS send this correspondence on 1 June 2016 and sought the following information from Kropz. The title of the letter is: Elandsfontein Exploration and Mining (Pty) Ltd: Water Use Licence in terms of section 40 & 41 of the National Water Act, 1998 (36 of 1998), Berg-Olifants Water Management Area.

"The required information are as follows:

- The final Mine Dewatering report prepared by SRK and;
- The written confirmation from the Department of Environmental Affairs and Development Planning stating their position on the proposed development.

[99]. Please note that no water uses may comment prior to the approval from this Department.[155] After some exchange of correspondences between the parties, ostensibly satisfying the requirements of the DWS, the following letter was written to Elandsfontein Exploration and Mining (Pty) Ltd (Kropz) on 6 September 2016. The heading is:

[153] See Maccsand v City of Cape Town: supra paragraph 12.
[154] See pages 5-6 of the Appeal records.
[155] See page 2084 to 2085 of the RoD.

Elandsfontein Exploration and Mining (Pty) Ltd: Water Use Licence in terms of section 40 & 41 of the National Water Act, 1998 (36 of 1998): Taking Water from a Water Resource: Farm Elandsfontein 349, Portion 2, Malmesbury.

Amongst others the letter stated that: "You have submitted the minimum critical information required for the Department to process your application. Your application will be evaluated by the Regional Head office, if more information is required, you will be informed."[156] These correspondences as well as others copious papers that were submitted by Kropz to the DWS clearly indicate that the DWS officials were vigilant and applied their minds in assessing this WULA in order to decide whether the WUL should be recommended to the decision-maker for either issuance of the WUL or decline the issuance of the WUL.

[100]. The appellant's pleading document and its heads of argument is mistakenly arguing that Kropz had to apply for another environmental authorisation over and above the one granted by the DMR. The DMR finished Kropz with a detailed letter of authorisation dated 12 December 2016, titled "Environmental Authorisations."[157] The valediction of the approval letter reads as follows *"13. Recommendations" In view of the above, the NEMA principles, compliance with the conditions stipulated in this EA, and compliance with EMPr/closure plan, the competent authority is satisfied that the proposed listed activities will not conflict with the general objectives of the Integrated Environmental Management stipulated in Chapter 5 of NEMA, and that any potentially detrimental environmental impacts resulting from the listed activities can be mitigated to the acceptable levels. The authorisation is accordingly granted. Your interest in the future of the environment is appreciated.*"[158] This letter that was issued by the DMR being the competent authority to issue environmental authorisations for mining activities as confirmed by the constitutional court in the Maccsand case. The Centre for Environmental Rights, (a prominent Environmental organisation) said the following in regarding the Maccsand judgement. "Crucially, the judgement confirms that mining operations and mining companies must comply with all laws, and that the MPRDA does not

[156] See pages 2108 of RoD.
[157] See pages 2651-2666 of the RoD.
[158] See page 2666 of the RoD.

trump other legislation, including provincial legislation like the Land Use Planning Ordinance."[159]

[101]. Kropz even went to apply for a rezoning of the farm Elandsfontein 349 from agriculture to mining at the Sadhana Bay Municipality.[160] Sadhana Bay Municipality being the competent authority to approve applications rezoning approved the rezoning application from Kropz. The This is another confirmation that Kropz acted within the applicable legislations as per the decision in the Maccsand case.[161] Olivier JJ, said the following regarding Kropz' compliance with the principle laid down by the court in the Maccsand judgement "The implication of the CC decision in Maccsand is thus that legislation dealing with specific functional domains, each requiring authorisations by its functionary (whether national legislation (e.g. SALA), provincial legislation (such as LUPO), or municipal legislation (enacted in accordance with section 156(2) of the Constitution, read with Schedule 4 (Part B) and Schedule 5 (Part B)), remains valid and enforceable."[162]

[102]. Although the documents in the RoD are voluminous, more than 3800 pages, they have been chronologically well arranged and they are easy to read. I disagree with the bald claim by the former attorney of record for the appellant by stating that the documents provided by the consultant of Kropz, i.e., Braaf Consulting were in shambles. Mr. Andersen said that "The water experts consulted by the appellant and who's report are attached to this appeal agree that the iWULA was of such poor quality that the decision-maker ought to have rejected the application outrightage.[163] As part of their appeal grounds on substantive issues, the appellant procured the services highly qualified experts in Water Management to strengthen its case.[164]

[159] See https://cer.org.za/news/media-release-constitutional-courts-decision-in-maccsand-case-marks-end-of-an-era.
[160] See 443, paragraph 61 of the Appeal records.
[161] Maccsand V City of Cape Town & others; supra at footnote 48.
[162] Olivier NJJ et al; Maccsand (Pty) Ltd v City of Cape Town 2012 (4) SA 181 (CC) (PER) (2012) (12) 5 at page 559 of 638.
[163] See page 5 paragraph 8.2 of the Appeal record.
[164] See page 31 of the Appeal record.

Dewatering of mining pit and the Artificial recharge into the down gradient acquirer.

[103] A substantial part of the experts reports, and the oral evidence testified by the expert witnesses was focusing on these water uses and their potential pollution to the water resources. I will start with the expert reports for the appellant who did not testify at the hearings and then deal with the expert reports of the authors who testified during the hearings.

Objection to the IWULA by Cullinan & Associates Attorneys dated 10 February 2017

Athough this report was signed off by Mr. Walter Anderson who is not an expert in Water Management, I will give my judgement on it. The objection is based amonghts others lack of puplic participation for the purpose of the IWULA.[165] I have dealt with item extensively in paragraph 72 to 86 above and dismissed this ground of appeal. The objection letter further refers to the 2016 Nel report and Cullinan & Associates Attorneys clearly stated that they stand by Dr.Nel's report regarding the Dewatering and artificial recharge into the Langebaan Lagoon.[166]

[104]. It is common cause now, that Dr.Nel testified that more research was done since he submitted his report in 2016, and that he is satisfied that the dewatering process and the artificial recharge into the Langebaan Lagoon will have very minor negative impacts if any. It is important to indicate that even in the 2016 Nel report, Dr. Nel is not totally objecting to the operation of the mine.

Item 10 . Adaptive Measures.

10.1. Potential impact.

Adaptive measures in the management of site groundwater dewatering and artificial recharge might be required due to imperfect knowledge of the system and uncertainty regarding the following:

[165] See page75 to 77 of the Appeal records.
[166] See page 77 to 81 of the Appeal records.

- The volumes of water that will be pumped from the mine;
- The volume of water that can be artificially recharged;
- The extent of changes due to the redisdtribution of water in the aquifer; and
- Future changes to the mine plan.

[105]. **10.2. Mitigation**

The mine is currently compiling a management strategy. The first draft seems to indicate that the mine is committed to best practice management and guidelines. Additional requirements from SANParks and DWS must still be discussed and included."[167] Dr. Nel was the fourth commentator to acknowledge and comment Kropz commitment to sustanable development.[168] The DWS added its voice in the correspondence to Kropz on 30 July 2018 titled "Compliance feed back letter: Submission of the Integrated WasteWater Management Plan (IWWMP) for Elandsfontein Exploration and Mining (Pty) Ltd (01/G10M/ABCGIJ/5296),Hopefield

"4.1. The Department is satified with the 2018 IWWMP submitted.

4.2. The IWWMP is a working document that should be in practice at the facility on a daily basis.

5. The Department would like to comment Elandsfontein Exploration and Mining (Pty) Ltd for striving to comply with the conditions of your Water Use Licence".[169]

[106]. In his conclusion under item 12, Dr Nel stated the following:

"Although there are many aspects of the groundwater system underneath the Elandsfontein Phosphate Mine site that is not well understood the impact to the West Coast National Park and the Langebaan Lagoon can be managed to mitigate any mine related impact that might occur.

[167] See page 159 of the Appeal records.

[168] The CWCBR chooses to support EMM in their application as they have proven that they conduct their business in an environmentally responsible manner. (…) [A]ll precautions are taken to minimize the environmental impact, particularly with regards to the Geelbek Wetland." See pages 1202 to 1203 of Rod. The DMR Kropz on 23 April 2015 for going an extra mile in practicing sustainable mining. See page 3266.

[169] See page 572 of the Appeal records.

[107] The main impact risk from the Elandsfontein Phosphate Mine is the dewatering of the mine pit that could affect the down gradient Langebaan Lagoon freshwater ecosystems, as well as local water quality changes.

The 2016 Nel report was part of the documents that were discussed at the WUUUACC meeting which recommended to the decision-maker to issue the WUL to Krop. The conclusion of the 2016 Nel report vindicates Kropz and the rdecision-maker.Cullinan & Associates Attorneys did a disservice to its client's case by relying on a report that is commending Kropz as a company. Braaf the Consultant for Kropz could not have asked for a better conclusion than the one given by Dr.Nel.

[108]. Adaptive Management (monitor and modify approach) means an "approach to the management of natural resources that is based on the learning by doing and on making decissions as part of an on-going process of monitoring,review and adaptation. A planned course of action is kept under constant review and is adapted where appropriate as new information becomes available from the monitoring both result publication of new scientific findings and expect judgment and changing needs of society."[170] This defination is consonant to the expert testimony of Dr. Botha and Dr.Nel for Kropz. I diagree with Counsel for the appellant's submission that Kropz abused the principle of Adaptive Management as part of its submission to the decision-maker and during the hearing.[171] The 2016 Dr.Nel report (October) suggested the implementation of adaptive management to mitigate any risk caused by the mining activities.[172] The department's Geohydrologist also supported the use of adaptive management.[173]

[109] The conclusion of the 2016 Nel report further exenorates the decision-maker i.e.the Director-General as well as the officials who worked on this application, more especially Mr. Dreyer, the assessor from the bald and unmeretorious allegations of apprehension of biase towards the applicant Kropz. The bald allegations read as follows "2.6. The decision-maker and its delegated

[170] Park C and Allaby M; A dictionary of Environment and Conservation 2013 (Oxford Press) 2nd edition page 8.
[171] See page 6 of the appellant's HoA.
[172] See page 159 of the Appeal records.
[173] See page 3476, item 26 of the RoD.

functionaries conducted themselves in a manner creating a reasonable apprehension of bias."[174] I agree with the submission by Counsel for the first and second that the appellant had not made any case during the hearing and even in the Heads of Arguments.[175] Kropz tried its level best to follow all the relevant legal requirements in obtaining the WUL. The compliments that it received from different independent bodies and an esteemed Geohydrologist like Dr. Nel, considering that he authored the 2016 Nel report while working for SANparks is indicative of the fact that Kropz was given any special treatment in this application.

Reports of experts witnesses who did not attend the hearing

[110]. Dr. Roger Parsons, of Parson & Associates submitted a report dated 15 March 2017.[176] Some of his comments are that the supporting documents of the IWULA were in shambles and that the sequence in the documents differed from the contents list (page).[177] I don't agree with this statement. I have earlier alluded to the fact that the documents are volumnuos but throughly organised. It is for this reason that Adv. Ferreira, Counsel for the appellant was able to provide all the parties as well as the panel members with the indexed and paginated files that were neately packed and the sequence of events in the RoD documents and the pleading papers are very easy to read, albeit time consuming. I do aplot Adv. Ferreira for her proffessionalism on this aspect.

[111]. Dr. Parson further made a very serious statement regarding relevancy of section 21 (j) water use application. She stated that " Simply put-the mine pit has to be dewatered to allow mining to take place. All claims in the iWULA and supporting documentation that the dewatering is a matter of safety are false and misleading."[178]

Dr. Parson further stated the following regarding the Artificial recharge: "The pilot artificial recharge test of 15L/s showed that the planned methods of

[174] See page 2 of the Appeal records.
[175] See page 33 of the first and second respondent's Head of Arguments.
[176] See pages 117 to 125 of the Appeal records.
[177] See page 118 of the Appeal records.
[178] See page 121 of the Appeal records.

recharge (horizontal pipe) cannot be used and that vertical boreholes will have to be used to artificially recharge the abstracted the abstracted ground water back into the ground. Given the expected volume programming reach back into the aquifer during their first yeah is 300 and 71st I conducted at 15 liters per second or 4% of the expected one is inadequate".[179] This untested statement is incongrouos with Dr. Nel's concluding report which stated that "Based on the best data and knowledge of the system, the numerical model forward predictions conducted by the mine's consultant show that this artificial recharge mitigation will result in no impact on the long ban lagoon."

[112]. Dr. Nel's version was tested at the hearing and he emerged as a credible witness and his knowledge of the area and the subject matter "Numerical modelling" is sapiental. I will attach no evidential value on Dr. Parson's report. I agree with Counsel for Kropz that the evidence in Dr.Parson's report was not tested in this appeal hearing.[180] Even if Dr.Parson was called to testify, his testimony was going to be antagonistic to that of Dr. Nel. The conclusion of Dr. Nel and Dr.Parson are paradoxical to one another,yet they would be testifying to support the appellant's case.

[113]. The appellant also procured the services of Dr. Christine Colvin to critically asses the WULA more especially the ground water in the area. Dr. Colvin's report was not tested at the hearings.[181] One of the main concern of Dr.Colvin is that "The the scale of groundwater abstruction proposed by the mine is an order of magnitude greater than anything previously experienced in this area. In year 1 they propose abstracting and reinjecting 11 million m3. Prior to 2008 the West Coast District Municipality abstracted 1.46 million m3 from the lower aquifer 10 kilometer to the north-north east of the mine site.This resulted in a 10m drop in the water level around the well-filled and the monitoring committee (including DWS) lowered the abstraction rates by 10% to prevent further declines in groundwater levels (DWS,2010).[182]

[179] See page 123 of the Appeal records.
[180] See page 7 of Kropz HoA.
[181] Ibid.
[182] See pages 3320 to 3337 of the RoD, as well as 14 of the Appeal records.

[114]. I agree with Counsel for Kropz that the evidence in Dr. Colvin's report was not tested at the hearing".[183] Even though the conclusion of Dr.Colvin's report is not militant towards the issuance of the WUL to Kropz, I will still attach no evidential value to it. There is a discord between the conclusion of Dr. Colvin and Dr.Nel's October 2016 report. The appellant's objection to the to issuance of the WUL to Kropz is based on three expert reports that have are contradicting one another soritical to their conclusions. Even if the Water Tribunal was confined to adjudicate this appeal based on the evidence that was before the WUUUACC and the Director-General, I will still dismiss this appeal. It failed to meet the very basic requisite to persuade any presiding panel member(s). The element of corroboration is one of the basic requirements of proving a litigant's case in any forum. I also took judicial notice of the fact that Dr.Covin is a member of the Water Monitoring Committee where-by she represents her employer WWF who did not follow-up on its objection to the issuance of the WUL to Kropz. She was present at the Water Monitoring Committee held on 14 June 2019,[184] and during other meetings she tendered apologies.[185]

[115]. Appellant's last substantial ground of appeal is that "2.5. The decision-maker failed to be guided by the precautionary principle and public trust doctrine."[186] The evidence contained in the pleading documents and Record of Decision displayed exquisite proof that the decision to issue the WUL to Kropz was taken as per the guidance of the precautionary principles and the public trust doctrine. I have already alluded to the fact that the people who objected to the granting of the mining right to Kropz are Ms. Carika van Zyl, Ms. Liezel Strydom as well as Mr. van der Westhuizen. Ms. Strydom and Mr. van der Westhuizen's reasons for opposing the mining operations at Elandsfontein farm are purely based on racism.[187] It is only Ms. Carika van Zyl who stated that "No research was done on small animals such as tortoises and lizards. We did not see any environmental control officer on site during the bulldozing".[188] The mine officials disputed this. The DMR which is the competent authority to issue environmental

[183] See page 7 of Kropz HoA.
[184] See pages 21 to 22 of Annexure A.
[185] See page 593 of the Appeal Records.
[186] See page 2 of the Appeal Records.
[187] See page 684 of the Appeal Records.
[188] See page 685 of the Appeal Records.

authorisations for mining activities commended Kropz for taking efforts to implement sustainable mining.

[116]. "The Department would like to comment Elandsfontein Exploration and Mining (Pty) Ltd for striving to comply with the conditions of your Water Use Licence".[189] The mine currently proposes to mitigate the potential dewatering impact by putting back the groundwater abstructed into the same aquifer system down gradient of the mine, using artificial recharge. Based on the best data and knowledge of the system, the numerical model forward predictions conducted by the mine's consultant show that this artificial recharge mitigation will result in no impact on the long ban lagoon."[190] The DMR finished Kropz with a detailed letter of authorisation dated 12 December 2016, titled "Environmental Authorisations."[191]

[117]. The valediction of the approval letter reads as follows *"13. Recommendations" In view of the above, the NEMA principles, compliance with the conditions stipulated in this EA, and compliance with EMPr/closure plan, the competent authority is satisfied that the proposed listed activities will not conflict with the general objectives of the Integrated Environmental Management stipulated in Chapter 5 of NEMA, and that any potentially detrimental environmental impacts resulting from the listed activities can be mitigated to the acceptable levels. The authorisation is accordingly granted. Your interest in the future of the environment is appreciated."*[192]

[118]. This letter that was issued by the DMR being the competent authority to issue environmental authorisations for mining activities as confirmed by the constitutional court in the Maccsand case. The Centre for Environmental Rights, (a prominent Environmental organisation) said the following in regarding the Maccsand judgement. "Crucially, the judgement confirms that mining operations and mining companies must comply with all laws, and that the MPRDA does not trump other legislation, including provincial legislation like the

[189] See page 572 of the Appeal records.
[190] 161 of the Appeal records.
[191] See pages 2651-2666 of the RoD.
[192] See page 2666 of the RoD.

Land Use Planning Ordinance."[193] All these testimonial letters by the different competent bodies and specialists like Dr. Nel confirm that the decision-maker approved the issuance of a WUL to Kropz being guided by the precautionary principle and public trust doctrine. This ground of appeal is really a scrapping of the bottom of the barrel. It is according dismissed.

Analysis of the comments by DWS Internal Specialists through the lens of the Gugulethelu Family Trust decision.

[119]. Mr. Dreyer, the assessor sought internal comments from internal specialists as part of the internal process to assess the IWULA from the applicant Kropz, and he received the following comments:

National Water Resources Planning Unit

"National Water Resources Planning is not supporting the recommendation to issue the water licence. This was based on the effects dewatering of the mine may have on the Reserve and its sustainable functioning. Additionally, that Saldanha Municipality has for many years been abstracting water from the very same aquifer where the mine will be dewatering and that it could jeopardise the integrity of the aquifer and water security of the Saldanha Municipality."[194]

[120]. **Resource Protection Unit**

This unit did not recommend the issuance of the IWUL because the mining activities are being regulated in terms of section 21 (c) and (j) of the National Water Act. The mining activities were going to take place in an area situated between two watercourses. They are the South and Groen River systems and their associated wetlands as well as to the downstream water resources, namely, the Langebaan Lagoon and the associated wetlands. The Langebaan Lagoon has been declared a Ramsar Status and a Protected Area together with the West Coast National Park.[195]

[193] See https://cer.org.za/news/media-release-constitutional-courts-decision-in-maccsand-case-marks-end-of-an-era.
[194] See page 3473 of the RoD.
[195] See page 3481 to 3483 of the RoD.

[121]. **The Civil Design Unit**

The application in terms of section 21 (a), (b), (e), (g) and (j) of the National Water Act (Act 36 of 1998) is supported on engineering principles on the following conditions:

a) The licensee must submit construction drawings, specifications, design reports and the operation and maintenance manual by the engineer for the storm water dams and the plant process dam, after approval of the water use licence but before construction commence.

b) The licensee shall within 30 days after the completion of the activities inform the relevant authority in writing thereof. It shall be accompanied by a signature of approval from the designer (Professional Engineer) that the construction was done according to the construction drawings.[196]

[122]. **Groundwater Unit (Geohydrology) Unit**

This unit supported the issuance of the IWUL after having been satisfied with discussions that addressed its concerns during a meeting of the WUAAAC on 30 January 2017. However, this unit supported the issuance of the IWUL subject to a list of stringent site-specific conditions. The unit further required an agreement from the Western Cape Resource Protection Division and WA&IU: Environment and Recreation that the strict site-specific conditions provided adequately address their concerns. The unit listed 79 strict site-specific conditions that must be adhered to by Kropz.[197] For reasons that were not provided to the Tribunal panel, not all the 79 site-specific conditions were included in the licence conditions. This deficiency in the IWUL conditions is one of the grounds of appeal in this matter.

[123]. Counsel for the appellant meritoriously submitted that the department's Ground Water Unit (Geohydrology) supported the issuance of this IWUL subject to the 79 site-specific conditions. Without all the 79 site-specific conditions not being included in the IWUL conditions, then the issuing of the IWUL would not have

[196] See page 3483 of the RoD.
[197] See page 3473-3481 of RoD.

been supported by this unit. The conditions in the current WUL do not include all the 79 site-specific conditions, that were provided for by the Groundwater Unit (Geohydrology). I fully concur with this submission.

[124]. Item 4 of the resolutions of the WUAAAC meeting held on 30 January 2017, whereby the issuance of this WUL was recommended stated the following:

4. <u>Summary of suggested special conditions</u>

"This licence will be drafted by the regional office and all specialist conditions will be included in the licence".[198] Counsel for the third respondent submitted that "It is not necessary to recite all of these conditions".[199] I emphatically disagree with this submission. I agree with the submission of Counsel for the Appellant on this aspect. She cogently alluded to the fact that "(…) [t]he conditions in the WUL have been watered down to such an extent so as to render the Water Monitoring Committee effectively powerless to ensure adequate oversight."[200] There is no indication on the Record of Recommendation, especially on the part where the Director-General had to singe that he made such a statement that some of the site-specific conditions are interrelated or duplicated.

[125]. Even if the Director-General would have advanced such reasoning, I would still dismiss that reasoning. All the site-specific conditions must be included in the licence. The situation in this case replicates the facts of the case in Guguletto Family Trust v the Department of Water Affairs and Forestry.[201] In short, the facts in that case before the Water Tribunal was that the application for the award for the water licence was investigated and considered by the Chief Director: Department of Water Affairs and Forestry, Free State region. She recommended a written record of decision that the licence be granted.

[126]. She attached a draft licence to her recommendations for consideration and approval by the responsible authority. The decision records that the considerations mentioned in section 27 were taken into account, as well as the

[198] See page 3488 of the RoD.
[199] See page 35 paragraph 85 of Kropz HoA.
[200] See page 18 of the appellant HoA.
[201] CASE NO: WT16/07/2009

recommendations of: (a) the Scheme Manager: Sand Vet Water Users Association; (b) the Director: Department of Agriculture; (c) the Communications Officer: Free State Regional Land Claims Commission; and (d) the Area Manager: Absa Corporate and Business Bank (being the mortgagee bank Vermeuinskraal)."[202] The responsible authority declined to award the WUL to the Guguletto Family Trust. The decision to decline the WUL to Guguletto Family Trust was unmeritoriously confirmed by the Water Tribunal on 18 May 2010. The error in law that was committed by the responsible authority and the Water Tribunal was to ignore the recommendations of the Chief Director: Department of Water Affairs and Forestry, Free State region who was more operational and had the technical appreciations of what was happening in the region. She was exactly in the position of Ms. Vermaak the Geohydrologist.

[127]. The appellant, Guguletto Family Trust appealed the Water Tribunal decision to the High court in the unreported case of Guguletto Family Trust V The Department of Water Affairs and Forestry.[203] In paragraph 9 judgement, the Honourable Murphy J stated the following, "the favorable recommendation was forwarded to the Director-General: Department of Water Affairs and Forestry, Pretoria in December 2008. On 2 June 2009, the first respondent, the Chief Director: Water Use, Department Water Affairs and Forestry, Pretoria addressed the following letter to the appellant: (…) [A]fter considering your applications together with all supporting documents including your response to my letter dated 23 March 2009, it is with regret to inform you that your licence applications (…) [i]s not successful. Unfortunately, your applications do not fulfil the requirements as they do not promote redress of the past and gender discrimination.[204] The recommendation of the Chief Director: Water Use; Free State Region which proposed a draft licence condition strikes a sensible balance in the application of section 27 (1). (…) [I]t also identified that the proposed water use would have no negative environmental impact and implicitly accept the appellants assertion, (…)".[205]

[202] See paragraph 8 of the judgement.
[203] Case No. A566/10 delivered on 25 October 2010.
[204] See paragraph 9 of the judgement.
[205] See paragraph 23 of the judgement.

[128]. “Moreover, considering that the draft licence was proposed by an official of the Middle Vaal Water Management Area to which the ISP applied. It is reasonable to assume she had knowledge of the ISP policy statement on past discrimination and that it remained current and relevant. The recommendation also did not lose sight of the possibility of revisiting the issue throughout the duration of the undertaking for which the water use will be authorized. While the proposed licence period is for 20 years the conditions of the draft licence allow for a review every five years, permitting the amendment of its terms to prevent the deterioration of the quality of the water resource, to take account of any insufficiency and to accommodate changes in social-economic circumstances”.[206] The following orders are accordingly made: (ii) the Appellant is granted a licence on the terms and conditions set out in the draft licence attached next to the records of decision of the Chief Director: Department of Water Affairs and Forestry, Free State Region and dated 12 December 2008.”[207]

[129]. I will be remiss in my duty as the Chairperson of the Water Tribunal if I do not walk in the footsteps of the Honourable Murphy J as set-out in the Gugulethu Family Trust judgement. For these reasons, all the 78 site-specific licence conditions that were submitted by the Geohydrologist as per the resolutions of the WUUUAC meeting that was held on 30 January 2017 must form an integral part of the constitution of the Water Monitoring Committee for the Elandsfontein Phosphate Mine.

[130] The acute deficit in relation to the lack of monitoring of policies and WUL conditions is a matter of common cause in the water management sector, hence I applaud the recommendation for the formation of a water monitoring committee by the Department’s geohydrologist. The desperate need for the vigilant monitoring of compliance with WUL conditions was elucidated by Mdlalose, NPS as follows: “As a common condition the Department requires that licence holders conduct internal and external audits within their facilities and external audit reports are to be submitted on an annual basis to the

[206] See paragraph 24 of the judgement.
[207] See paragraph 27 of the judgement.

Department. Similar to the IWWMP submissions, this has been lacking from the side of licence holders as well as on the side of authority in terms of enforcing. It can be submitted that the water use licence has failed to be a tool to uphold and advance water resource protection and conservation. This failure is purely due to a lack of enforcement from the regulator. The National Water Act makes provision for the use, the management, development, and protection of water. It also provides for compliance, enforcement and further makes provisions for remedies for failure to comply with its provisions, Excellent as the provisions and the Act itself is, implementation has proven to be unsuccessful."[208]

[131]. **Comments from external departments and other stakeholders**

The following stakeholders or interested and affected parties commented regarding this WULA: The Department of Environmental Affairs had not submitted its comments at the time of the issuance of the WUL. It however responded with positive comments in a letter dated 12 April 2017.[209] The Director-General indicated that the West Coast National Park is managed by SAN Parks, which is an entity that reports to the Department of Environmental Affairs as per section 44 of the National Environmental Management Protection Areas Act (NEMPA) 2003 (57 of 2003). The Department of Environmental Affairs relied on the comments from SAN Parks in supporting the issuance of the WUL to Kropz on condition that the DWS adhered to the conditions that SA Parks had provided DWS. The Department of Mineral Resources issued a mining right as well as an environmental authorisation to Kropz.[210] The other Interested and Affected Parties (I&AP) who objected to the WULA submitted by Kropz were covered in the licence conditions, except WCEPA,[211] hence this appeal matter before the Tribunal.

[208] Mdlalose, NPS; Evaluation of the water use licensing regime of the National Water Act in advancing the protection and conservation of water resources. LLM Dissertation on pages 47-48. See Evaluation of the water use licensing regime of the National ...https://researchspace.ukzn.ac.za › handle.

[209] See pages 3249 to 3250 of RoD.

[210] See page 3483 of the RoD.

[211] See 3484 to 3485 of the RoD.

[132]. **Section 27 of the NWA. Considerations for issue of general authorisations and licences.**

For this hearing, I will refer to this section as the qualification section. Section 27(1) in issuing a general authorisation or licence a responsible authority **must** take into account all relevant factors, including –

(a) existing lawful water uses;

The mine is a greenfield, and there is no existing water use.[212]

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

Elandsfontein's Exploration and Mining B-BBEE scorecard for the period 12 February 2016 to 11 February 2017 shows the company rated as a Level Four B-BBEE contributor.[213] The major shareholder of Kropz, via its holding company, is African Rainbow Capital, a subsidiary of Ubuntu-Botho Investments. African Rainbow Capital also holds a direct 26% interest in Kropz as Kropz' BEE partner.[214]

[133]. (c) efficient and beneficial use of water in the public interest.

The estimated capital investment during the construction phase of the project is in the order of R1.33 billion, with approximately 800 people employed during the period. During the planning phase of the project, a local employment target of 30% was established for the construction phase of the project. The figure below shows the actual local employment statistics achieved for the project to date – on average, more than 50% of those employed in the construction of the project reside within the Saldanha Bay Municipality. The operations phase of the project will employ at least 300 people, with an ultimate target of 75% from the local communities. Approximately 82 skilled and management and 218 low and semi-skilled. Training opportunities will be provided to ensure that local community members can be placed in skilled employment positions as well as low and semi-skilled posts. The employment numbers and operation expenditure has been modelled to show an impact on the direct livelihood (direct workers and dependents) of approximately 1 495 people. Indirect employment opportunities amount to 32 908 during the operational phase.[215]

[212] See page 3428 of RoD, as well as page 3 of Kropz HoA and Exhibit A page32.
[213] See page 1383 of RoD.
[214]See page 3 of Kropz HoA, as well as Exhibit A page 32.
[215] See page 3429 of the RoD.

[134]. (d) the socio-economic impact –

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

The mine cannot operate without the local and temporary dewatering of the mining area to access the ore. The mine has a positive socio-economic benefit through the employment of locals. Low-skilled and semi-skilled labour will be sourced mainly from the local communities and surrounding areas, in conjunction with the West Coast Business Development Centre. In addition, training opportunities will be provided to ensure that local community members can ultimately be placed in skilled employment positions. The phosphate will be sold both locally and internationally, therefore earning foreign exchange for the country. The mine will have a net positive impact on economic growth of the Saldanha Bay Municipality, the West Coast District and the Western Cape Province.[216]

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

Failure to authorise the water use licence would prevent the completion of the mine. This would result in the loss of significant employment opportunities for the area, substantial economic growth of the local and regional surroundings, and failure to earn foreign revenue for the country. Raw water for the mine will be procured from the Saldanha Bay Municipality. If the project does not proceed, large revenue streams over the short-term will be lost by SBM. According to the report released by Stats SA on 24 August 2021 entitled Quarterly Labour Force Survey (QLFS), the unemployment rate in the country was 34.4% in the second quarter of 2021.[217]This project will come as a relief to create sustainable employment in the Saldanha Bay Municipality and the surrounding areas.

[216] See page 3430 of the RoD.

[217] Q2:2021 The official unemployment rate was 34,4% in the sehttp://www.statssa.gov.za › publications › Media release issued on 24 August 2021.

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

The Berg Olifants Catchment Management Strategy has not been development yet, but the Berg ISP identifies that the Saldanha Bay area expected to see major industrial development in the future. The ISP also noted that the groundwater resource should be monitored.[218]

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

As part of the application process for permission to proceed with mining, a host of specialist studies were carried out (groundwater, environmental, surface water etc.). From the studies it is clear that all necessary measures will be in place to ensure that the proposed mining activity will not have any effect on the water resource or on other water users.[219] The WUL is tied to 79 site specific conditions to ensure that any possible water contaminations will be mitigated accordingly.[220]

[137]. (g) the class and the resource quality objectives of the water resource.

The groundwater quality glass in G10M fall within Class II of the DWS water quality classification as a result of high chlorine and sodium concentrations. Class II of the DWS water quality classification represent water that is suitable for emergency use or limited short-term use.[221]

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

As mentioned above, the total estimated investment in the mine will be R1,33 billion. To date an amount of R346 million has been spent, and an amount of R786 million committed, i.e., orders placed, but not yet invoiced.[222] "Kropz commissioned these specialists as part of the environmental impact assessment process provided for in terms of the National Environmental Management Act 107 of 1998 (NEMA), as required by the MPRDA for the

[218] See page 3430 of the RoD.
[219] See page 3431 of the RoD.
[220] See pages 3473 to 3481 of the RoD.
[221] See page3487 of the RoD.
[222] Ibid.

granting of a mining right, at a cost of more than R25 million, of which R6 million was dedicated to specialist water studies."[223]

[138]. (i). the strategic importance of the water use to be authorised.

This is a water use with no strategic importance[224]

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

There are no international obligations that need to be met and the water quality for the reserve will be managed through strict licence conditions. The mine is situation however located in close proximity to the Langebaan Lagoon which is a Ramsar site.[225]

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

The mining right for the mine is for fifteen (15) years and the water use licence is recommended for a period of fifteen (15) years and it will be reviewed every year for the first three (3) years and thereafter, every three (3) years.[226]

[139]. This section provides a list of the factors that the decision-maker must consider equitably so, without elevating any of the considerations, above others. The departure point in interpreting this section, is that the WUAAAC and the decision-maker must give equitable consideration to all the factors that are listed in section 27(1) of the NWA. There is no factor which should be elevated to a higher status than other factors.[227] This section, and all other sections of the NWA and any relevant statutes in this matter must be purposefully interpreted. Botha C, said the following regarding the interpretation of statutes: "However, s39(2) is a peremptory provision, which means that all courts, tribunals or forums must review the aim and purpose of legislation in light of the Bill of Rights: plain meanings and so called clear, unambiguous text are no longer sufficient."[228] I agree with the submission of Counsel for the first and

[223] See page 2 of Kropz HoA.
[224] See page 3488 of the RoD.
[225] Ibid.
[226] Ibid,
[227] See Guguletto Family Trust V The Department of Water Affairs and Forestry. Case No. A566/10, paragraph 13. Unreported and delivered on 25 October 2010. See also Tikly v Johannes No 1963 (2) SA 588 at 590F-591A.
[228] Statutory Interpretation (Juta) (2016) (5th edition) 101.

second respondents when he referred to the judgement of the constitutional court in the well-traversed case of Fuel Retailers Association v DG: Environmental MGT, Mpumalanga.[229] Chief Justice Nqobo, as he was then stated the following in paragraph 27, "*sustainable development does not require the cessation of socio-economic development but seeks to regulate the manner in which it takes place. It recognizes that the socio-economic development invariably brings risk of environmental damage as it puts pressure on environmental resources."*[230]

[140]. Counsel for the first and second respondents meritoriously alluded to the fact that only two factors out of the eleven factors can be the basis of WUAAAC and the decision-maker to decline the issuance of a WUL. He aptly referred the panel to the well-read case of Makhanya NO v Goede Wellington Boerdery (Pty) Ltd and Another.[231]The decision-maker must strike a balance between the competing interests of economic development and protection of the environment like water resources.[232] He further articulated the fact that the appeal did not assail the other eight factors stipulated in terms of section 27 (1) of the National Water Act.[233] I fully concur with the line of reasoning espoused by Counsel for the first and second respondents. Counsel for Kropz also made the same logical submission regarding the fact that the issuances or declining of a WUL cannot be determined based on only two considerations found in section 27 (1)a of the National Water Act.

DWS' factual witness: Mr. Dreyer

[141]. The only factual witness for the first and second respondents, Mr. Dreyer accurately motivated the rationale for the Department to rely on the 2012 reserve determination when assessing the WULA. He alluded to the fact that the 2010 reserve determination was the latest determination that was suitable to rely on. This was in accordance with the provisions of section 17(1) of the NWA which provides that "until a system for classifying water resources has

[229] 2007 (6) SA 4 CC at paragraph 27.
[230] Fuel Retailers supra page 27 para [58]. See also page 15 of the department's HoA.
[231] [2013] 1 ALL SA 526 (SCA) (30 November 2012)
[232] Makhanya No v Goede Wellington Boerdery (Pty) Ltd and Another; supra at paragraph 34.
[233] See page 12 of DWS HoA.

been prescribed or a class of a water resource has been determined, the Minister must before authorizing the use of water under s22(5) make a preliminary determination of the reserve".[234] Counsel for the appellant tried to discredit the testimony of Mr. Dreyer on this aspect, however I have found two contradicting statements between the November 2019 Riemann report and the submission by Counsel for the appellant. Counsel for the appellant submitted that the WULA was approved based on the 2012 reserve determination.[235] Dr. Riemann stated the following in Riemann's 2019 expert report: "The Department of Water and Sanitation failed to adhere to its own process. The pre-application meeting between Kropz and the DWS clearly states the requirement for a comprehensive reserve determination for the WULA (to be determined by the DWS), but only the 2004 desktop reserve was taken into account in the WUL. This further compromises the ability to undertake a risk-based impact assessment."[236] I agree with the submission of Counsel for the first and second respondent that the appellant submitted no legal basis to assail the Department's reliance on the 2012 reserve determination.[237]

Analysis of testimonies of expert witnesses

[142]. The appellant relied on the testimony of Dr. Riemann as its expert and the only witness in this case. Dr. Riemann, an esteemed Hydrogeologist with more than 30 years' experience in groundwater and water resource management. He holds an MSc in Applied Geology from the University of Kiel in Germany, and a PhD in Geo-hydrology from the IGS at the University of the Free State.[238] Throughout his testimony Dr. Riemann displayed his elucidation of the subject matter and his accuracy and honesty in answering questions was beyond reproach. He has submitted three review reports for this case and some these reports were exegeted during his testimony. Due to the highly technical nature of the expert witnesses, he also played an aegis role to help Counsel for the appellant to assail the testimony of the expert witnesses of Kropz as per the agreement among Counsels of the parties. Dr. Riemann commenced his

[234] See page 19 to 20 of the Department HoA. See also page 1 of the RoD.
[235] See page 34 of the appellant's HoA. The re
[236] See page 154 of Annexure A.
[237] See page 19, paragraph 38 of the Department's HoA.
[238] See page 658 Annexure "B".

testimony on 10 December 2019. After he was sworn in as a witness, and without being probed he said the following, "You have seen the record of 3 000 pages. I have not reviewed all of it." This was a brutally honest and truthful statement, but it had the unintended consequences of weakening the appellant's case.

[143] Dr. Riemann further introduced the important issue of Adaptive Management. His sapiential and honest definition of Adaptive Management (AM) was that when one applies it, one does not make a once-off decision in managing any risk. He further stated that depending on the latest information that the mine will get in terms of its data modeling, the mine can even change the technology that it uses in its efforts to implement ground water management.[239] This statement regarding Adaptive Management was at odds with the legal submission made by Counsel for the appellant.[240] The definition that was explained by Dr. Riemann, the sole witness of the appellant supports that of Dr. Nel, one of the expert witnesses of Kropz.[241] Dr. Nel suggested the implementation of Adaptive Management while he was still working for SAN Parks in 2016. At that time, he had raised some concerns regarding the issuance of the WUL to Kropz. I have no reasons to doubt the honesty of Dr. Nel.

[144]. I must indicate that the implementation of Adaptive Management was submitted by Kropz as part of its efforts to mitigate any adverse impact to the water resources that could manifest because of the mining activities. Seward P *et al*;[242] say the following regarding Adaptive Management, "Predicting the dynamic response of an aquifer system to development, and what can be 'captured' will be exceedingly difficult. Aquifer systems are complex, difficult to understand, and the consequences of human intervention are difficult to predict, especially in the case of fractured rock aquifers, which cover 98% of South Africa. It is suggested that the way forward is to accept the complex, difficult-to-predict characteristics of aquifer systems, and build management

[239] See 660 of Annexure "B".
[240] See page 6 paragraph 16 to 19 of the appellant's reply to the HoA of Kropz.
[241] See page 159 of the Appeal records.
[242] Seward P et al; Sustainable groundwater use, the capture principle, and adaptive management (2006) Water SA Vol. 32 No. 4 at page 477 to 478.

strategies around those characteristics, rather than deny those characteristics and labour under the misapprehension that just a few more years of research will enable the sustainability of the system to be determined to the nearest decimal place. Such an approach can be found in adaptive management, which Maimone (2004) considers to be the only viable approach to be implemented. If this is successful, then larger-scale development might be considered, and so on."

[145]. This paragraph proves that the following submission by Counsel for the appellant is flawed "18. Given the absence of any, let alone sufficient, South African precedents on the use of adaptive management in authorisations which implicate section 2 of NEMA, the Water Tribunal may consider foreign law."[243] The legal submission by Counsel for the appellant contradicts the evidence of its sole witness. I must reiterate that the credibility of Dr. Riemann is not doubtful albeit flogging a dead horse in this case. I agree with the submission for Counsel for Kropz that Dr. Riemann's testimony during his evidence-in chief as well as during cross- examination was not necessarily assailing the issuance of the WUL to Kropz but was more concerned with the compliance with the WUL licence conditions. Most of Riemann's concerns will be resolved when all the WUL conditions will be fully complied with as per order of this judgement.

[146]. Kropz has welcomed Dr. Riemann's suggestions regarding the adherence to the licence conditions.[244] The other concern regarding Dr. Riemann's evidence is that he has never been on the mine site. All his reports are desk top products, while the other two expert witnesses (Dr. Botha and Dr. Nel) as well as Ms. Lawrence, the factual witness of Kropz have been on site because they work and/or are contracted by Kropz. Dr. Riemann attended some of the Water Monitoring Committee meetings and he should have requested the representatives of Kropz to arrange for him access to the mine. There are no records in the minutes of the Water Monitoring Committee which indicate that Dr. Riemann or any representatives of WCEPA requested the mine representatives to arrange access for Dr. Riemann to visit the mine. There was

[243] See page 6 of the appellant's reply to respondents' HoA.
[244] See pages 211 to 212 of Annexure "A".

no testimony given by any representative of WCEPA to explain to the panel the denial of access to the mine.

[147] One of the issues which Riemann raised during his testimony was that there would have been a decline in the water balance in the areas within 5km radius of the mine.[245] He stated the following "Hence the West Coast District Municipality and the Saldanha Bay Municipality currently exceed their allocation from the Berg River and do not have additional water available what to supply the mine."[246] This statement was not supported buy any corroborating evidence for the Saldanha Bay Municipality. In fact, the contrary is true in that the Saldanha Bay municipality signed a water supply agreement with Kropz. I find it strange that Dr. Riemann will make this statement without confirming its validity with the Saldanha Bay municipality. This statement it's very much speculative in nature and cannot be accepted. In conclusion, Dr. Riemann said the following "We suggest that these concerns and possible flaws are discussed with the legal team weather there is sufficient ground to appeal this licence."[247] These concluding remarks decimate the strength of the appellant's case in this matter.

[148] I also want to add that at the end of Dr. Riemann's re-examination by Counsel, I ask Dr. Riemann whether from his expert know that is beyond reproach whether he think that the licence ought not to have been granted to Kropz, and his response what that he does not think that the WUL should have been declined. I agree with the submission from Counsel for Kropz that most part of Dr. Riemann's testimony was more about the adherence to the 79 site-specific licence conditions that were suggested by the Department's Geo-hydrologist.[248] I have already stated in detail in paragraphs 77 to 787 with reliance on the Gugulethelu Family trust decision that all the 79 site-specifications suggested by the Geohydrologist must all be included in the licence conditions.

[245] See page 191 to 193 of the Appeal records.
[246] See page 191 of the Appeal records
[247] See page 193 of the Appeal records
[248] See page 42 of Kropz's HoA.

[149] On the other hand the panel received a very credible testimony from Ms. Lawrence regarding the water balance. She outstandingly took the panel into her confidence by indicating that Kropz satisfied the requirements of section 42.

Section 42(2) A responsible authority –

(a) may, to the extent that it is reasonable to do so, require the applicant, at the applicant's expense, to obtain and provide it by a given date with –
    (i) other information, in addition to the information contained in the application
    (ii) an assessment by a competent person of the likely effect of the proposed licence on the resource quality; and
    (iii) an independent review of the assessment furnished in terms of subparagraph (ii), by a person acceptable to the responsible authority;
(b) may conduct its own investigation on the likely effect of the proposed licence on the protection, use, development, conservation, management and control of the water resource.
(c) may invite written comments from any organ of state which or person who has an interest in the matter; and
(d) must afford the applicant an opportunity to make representations on any aspect of the licence application.

(3) A responsible authority may direct that any assessment under subsection (2)(a)(ii)

[150] She further indicated Saldanha Bay Steel which was one of the biggest employers in the area has closed. The Sunday Times reported the looming closure of the Saldanha Bay Steel as follows" Saldanha Bay Steel plant closure will be "catastrophic" for West Coast."[249] The article further stated that "An estimated 900 workers will be left jobless by the end of the first quarter of 2020 as the factory scales back production from its current 1.2-million tons of steel each year to none. The West Coast Chamber of Business has called for a meeting with stakeholders in the steel industry, warning about the impact of the

[249]https://www.timeslive.co.za/news/south-africa/2019-11-13-saldanha-steel-plant-closure-will-be-catastrophic-for-west-coast/

closure. Shanah Damonse, chairperson of the chamber, said it would be catastrophic. “No one can afford more unemployment,” she said.”

[151]. This part of Ms. Lawrence testimony is important in two folds. Due to the proximity between the premises of the of the Saldanha Bay Steel and the Elandsfontein Phosphate Mine relative to the Langebaan Lagoon, it is obvious that the two major operations would be abstracting water from the same water resource. The closure of Saldanha Bay Steel will mitigate any possible over-use of water from the water resource. The other importance issue which is a welcome relieve to the residence and business community in the vicinity is that the Elandsfontein Phosphate Mine will create the much-needed job opportunities in the area. The two major companies are in the mining sector. This means that most of the people in the neighborhood who would have been retrenched from Saldanha Bay Steel, will be, as a matter of cause be easily trainable if employed at the Elandsfontein Phosphate Mine Without. This piece of evidence is in line with the requirements of section 27(1) of the NWA. The issuance of the WUL to Kropz is beneficial to the people of Saldanha Bay Municipality and the surrounding areas, while the appellant’s basis for the objection to the mining operation is rooted in racist tendencies that should never be allowed to thrive in our democracy.

Testimony of Dr. Botha

[152] Before I analyse Dr. Botha’s testimony, it is important to identify the most important role-players, i.e., the specialists that Kropz contracted during the Integrated Environmental Management (IEM) until the WULA application of the IWUL and the ultimate issuance of the WUL. Geos was the main service provider who applied for the IWUL while IEM, during the application for the mining right, was the coordinator who consolidated the reports of the specialist studies that were submitted in support of the mining right and the IWUL.[250] Since the main risk relative to the grounds of appeal is the dewatering of the mine pit,[251] and the artificial recharge into the Elandsfontein aquifer, I will only mention the specialist reports relevant to this number one (1) risk of Kropz

[250] See pages 451 to 454 of the Appeal records.
[251] See page 33 of the Appeal records.

Phosphate mine. Geos further applied for a Geo-hydrological Assessment, proposed an artificial recharge pilot study, groundwater monitoring protocol, pumping test and recharge study. Blue Science compiled the Fresh water report. SRK Consulting compiled the Groundwater Dewatering report. Braaf Environmental Practitioner compiled the conceptual Closure plan.[252]

[152] Dr. Botha is a water resources specialist with an MSc in Engineering Geology and a PhD in Hydrogeology. He is the Director at Water hunters (Pty) Ltd. His company is an associate of Umvoto Africa (Pty) Ltd, where Dr. Riemann is a director. He has been involved in numerous water resource assessments and planning studies, with a particular focus on mine water management and efficient mine management. Dr. Botha's testimony was more in response to one of the recommendations of Dr. Riemann's report which suggested the mining operations should be stopped until all the studies have been completed.

"Impact of change in mine processing; Impact of expansion of mine footprint; Additional long-term geochemical tests; Update GWMP to include all required monitoring and data analysis, irrespective of responsibility; Development and implementation of QC process for monitoring data; Proof of concept investigation for all suggested mitigation measures to ensure that these are feasible and can be implemented timeously."[253]

I must indicate that even though Dr. Botha is not a legal practitioner, the salutation of his report distinctively summarized the interrelations amongst the applicable legislations regarding the One Environmental System (OES) in the mining industry in South Africa. It stated that "The environmental and groundwater impacts of stopping the water use activities at Elandsfontein must be considered in the light of three statutory and precautionary measures before opening the mine pit."[254]

[153] This well-articulated introduction of the interrelations amongst the applicable legislations in the OES was eloquently summarized by Botha & Bekink in their journal article titled 'Maccsand v City of Cape Town" commonly known as the

[252] Ibid.
[253] See page 612 of Annexure B.
[254] See page 597 to 608 of the Appeal Records.

Maccsand Trilogy.[255] I could not agree more with Dr. Botha's introductory statement.

[154] Dr. Botha cogently articulated the obliterating risks that the water resource would be exposed to, should Kropz stop the most important "mitigation activity "at the mine site, being the dewatering of the mine pit.[256] His report identified the following five risks which the water resources would have been exposed to should the mine stop dewatering the mine pit.[257] (i) Abnormal evaporation losses and salinity increase (ii) Engineering geology, high wall stability. (iii) Engineering geology; high wall stability, increased pit surface area. (iv) Pollution. (v) Consequences for DWS: Financial Security.

[155]. Dr Botha's evidence was in line with his report. He never contradicted himself during his evidence in chief and during cross examination by Counsel for the appellant. I must accept the testimony of Dr. Botha for the following reasons: He has nine years of operational experience as a Geo hydrologist in the mining industry. He was present during the Water Monitoring Committee and site meeting meetings. On the other hand, the appellant is relying on the sole testimony of Dr. Riemann. Beside his impressive academic background and expertise in the water sector management, the weakness in Dr. Riemann's testimony is that he has never been to the mine site. All his reports were based on desktop studies. What exacerbate the weakness in Dr. Riemann's testimony especially regarding site visit to the mine is the following: Counsel for the appellant lamented to the panel during the second day of hearing on 23 October 2019 that Dr. Riemann wanted to visit the mine site but the officials from Kropz did not give him access to the mine.[258] During the evidence in chief of Dr. Riemann, on 13 December 2019 Counsel for the appellant indicated with the approval of Dr. Rehman that according to his expertise knowledge he was able to review the reports of expert witnesses of Kropz without visiting the mine site. The discord between the two statements cuts too deep. I therefore must

[255] Botha & Bekink; Maccsand v City of Cape Town, Minister for Water Affairs and Environment, MEC for Local Government, Environmental Affairs and Development Planning, Western Cape Province, Minister for Rural Development and Land Reform, and Minister for Mineral Resources 2012 4 SA 181 (CC)' 2015 De Jure 456-467.
[256] See page 33 of the Appeal records.
[257] See page 599 to 607 of the Appeal record.
[258] See page

accept the testimony of Dr. Botha and the rationale of his report. I would have been egregiously remiss of Kropz to stop the dewatering of the mine pit based on a report generated from a desktop study.

[156] Kropz also relied on the testimony of Dr. Nel. an independent and respected hydrologist with a Masters in Hydrogeology from the University of the Free State and a PhD in Groundwater from the University of the Western Cape. [259] He worked for DWS for 10 years dealing with the applications for water use licences. His area of expertise, which he has demonstrated his passion and a high degree of sapient is the acquisition of better data. He has spent four years of his 10 years working in an area near Langebaan, involved in catchments to the north. He was also involved in regional water abstraction from the Langebaan Road aquifer, and in geophysical studies to determine the clay layer of the Langebaan Road aquifer.[260] With this kind of background I am satisfied that beside his outstanding academic background and knowledge, Dr. Nel has a firsthand personal knowledge of the area of interest in this matter. Dr Nel spent the last eight years consulting in the mining and modelling environment with GCS Water and Environmental Consultants (GCS), developing mining models, improving modelling techniques and developing better data collection.[261] He was later appointed by SAN Parks to conduct an assessment of the possible hydrogeological impacts of the mine, and to assess the various specialist reports prepared for Kropz. In his 2016 Nel report, he raised some of the concerned regarding the possible adverse impact of the water resources due to the mining activities of Kropz. In the 2016 Nel report, his conclusion in the 2016 report was never militant against the issuance of the WUL to Kropz. It was Dr. Nel suggested that the best way to mitigate any possible impact on the water resources because of the dewatering process, Kropz must implement Adaptive Management. Considering that the appellant relied on report compiled by different specialists, Dr. Nel being one of them, Dr. Nel maintained his independent and recommended that the mine should implement Adaptive Management. [262]

[259] See page 66 to 67 of the 3rd Respondent's Heads of Argument.
[260] Ibid.
[261] Ibid.
[262] See paragraph 22 above.

[157]. After he was appointed by Kropz as the hydrogeologist to undertake ongoing modelling (quantity and geochemical) required by the various site-specific conditions contained in appendix VII of the WUL Although Dr. Nel's scope includes amongst others the reference to dewatering impact, artificial recharge, water quality changes, clay stability, monitoring and adaptive management, I will dwell more on the dewatering and the artificial recharge into the aquifer because this is the number one risk in the mining activities at Kropz 'mine. As per the features of Adaptative Management, where-by the team will update their data and risk mitigation plans as and when more information becomes available, by the time he was appointed by Kropz, the data was enriched with new information and as a result Dr. Nel was able produce an updated modelling and the confidence and the accuracy of predicting the characteristics and reaction of the aquifer to the artificially recharged water.

[158] The improved information that was gathered after the WUL was issued, enabled Dr. Nel to produce an even more accurate report called Geochemical Transport Modelling in his 2018 (30 September) Nel report.[263] The importance regarding this part of the report under the heading Review of Monitoring Requirements is framed as follows. "Borehole PBH4 is well placed to detect any unexpected contaminant load from the waste rock dump. Quarterly water quality monitoring at this borehole is recommended, to include wet and dry seasonal data. The worst-case prediction of contaminants moving away from the artificial recharge wells shows limited movement before the slightly elevated concentrations will not be present within the national environment. It would be beneficial to do monthly monitoring of the injection water quality to ensure no contaminants is released into the aquifer. No additional monitoring holes near the injection holes are recommended. Boreholes SNP5 and SNP6 are placed downgradient of the injection boreholes and would detect any unexpected contaminant movement in the aquifer. Therefore, quarterly monitoring of SNP5 and SNP6 is recommended."[264] Even though the result in this report shows a remarkably high improvement in the accuracy the data collected to produce

[263] See pages 149 to 187 of Annexure B.
[264] See page 169 of Annexure B.

more modelling report, Dr. Nel still suggested more regular monitoring and quarterly report to be submitted and be discussed ostensibly at the Water Monitoring Committee. This demonstrates the level of professional and his assertiveness to his independent and credibility as an expert in the field of Ground Water Management.

[159] September 2019 Elandsfontein Geochemical Model Update.

The report was produced in line with Licence condition number 77, which stipulated that the geochemical groundwater model needs to be revised/updated periodically to evaluate the potential impacts of the various activities and water use on the underlying Elandsfontein Aquifer.[265]

His conclusion in this report was amongst other the following:

"Based on the current overburden and tailings leach data, no water quality related impact is expected on the surrounding users, wetlands, Langebaan Lagoon, Groen or Sout Rivers. It is recommended that quarterly monitoring of water quality on boreholes PBH4, SNP5 and SNP6 is conducted to confirm that no unexpected contaminants are leaching from the waste rock and tailings material. Monthly monitoring of the injection water is recommended to evaluate the concentrations of elements reporting to the in-pit dewatering under operational conditions."[266]

[160] Elandsfontein Aquifer Numerical Model Update Nel report (16 Sept. 2019)

This report deals specifically with risk regarding the dewatering of the mine pit and the artificial recharge. The conclusion in this report gave improved results regarding the numerical modelling of the Elandsfontein aquifer and the surrounding areas. The significance of the conclusions of this report are *inter alia;* "The monitoring data sets provide an improved understanding of the regional aquifer system properties and recharge processes. No impacts of dewatering of the mine are predicted for the Langebaan Lagoon or any surrounding users. (…) [T]he modelled increased volumes of pit dewatering and associated increases in artificial recharged water are not expected to change the net water balance of the aquifer. Various scenarios of parameter uncertainty

[265] See page 303 to 340.
[266] See page 319 of Annexure B.

have been considered; showing that the highest uncertainty in the volumes abstracted is natural recharge. The scenario where the total plant water supply is met by using an additional 473 000 m3/a of the pit dewatering instead of re-injecting it, will have negligible effect on the perimeter and in-pit dewatering and, on the water, arriving at the lagoon. The projected scenarios until 50 years after termination of mining and dewatering show that the increases in water levels due to artificial recharge is likely to increase water discharge volumes to the lagoon from 17 500 m3/day to 20 000 m3/day. This increased water discharge is likely to last until about 20 years post closure, and thereafter the water levels will be close to the pre-mining levels".

[161] In conclusion he stated the following:

"It is recommended that the numerical model be updated in 18 months from August 2019, as soon as the first data from the next phase mining is started. This update can then be calibrated against the additional stresses induced and provide reduced uncertainty for any further dewatering scenarios."[267] Dr. Nel's testimony was coherent and his explanation of switching roles from being an expert witness who virtue of his 2016 Nel report was part of the organisations that objected to the issuance of the WUL to Kropz. Although SAN-Park submitted an objection, Dr. Nel's report was not against the issuance of WUL. He satisfied the panel in explaining why he is now an expert witness for Kropz.

[162] His reasons were that due to his change in employment and being available for taking consulting work opportunity, Kropz recruited him because of his expertise and scare skill of numerical modeling in Water Management sector, he accepted the offer from Kropz, hence he testified in favour of Kropz. His position regarding the implementation of Adaptative Management as part of mitigating the impact of the water contamination was consistence and the results were proven in the Nel 2019 (6 Sept.2019). His testimony due to its very highly technical in nature, was not successfully assailed by Counsel for the appellant. It was for this reason that Adv. Ferreira submitted an unprecedently astonishing, application to allow Dr. Riemann to address the panel to put the record straight in assailing part of Dr. Nel's testimony. Adv. Ferreira honestly

[267] See page 339 of Annexure B.

conceded that she could not framed her questions properly because Dr. Nel's testimony was too technical for her to comprehend the information and then ask properly framed question. This application was not disapproved and as a result I will accept the testimony of Dr. Nel.

The co-existence of mining companies and environmental activists through the lens the Fuel Retailers Association v DG: Environmental Management & Others

[163] The constitutional court played a critical role of a pathfinder in the well-read judgement of Fuel Retailers Association of Southern Africa v Director-General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province and Others.[268] On paragraph 58 the court said "Sustainable development does not require the cessation of socio-economic development but seeks to regulate the manner in which it takes place. It recognizes that socio-economic development invariably brings risk of environmental damage as it puts pressure on environmental resources". This statement validates the report by Dr. Botha, when he was responding to Dr. Riemann's suggestion that Kropz must stop the mining activity, especially the dewatering of the mine pit until all the studies regarding the risk assessment are completed. The court further indicated the following [S]ustainable development is defined to mean "the integration of social, economic and environmental factors into planning, implementation and decision-making for the benefit of present and future generations."[269] Kropz WUL is fully complaint with this statement. The exquisite of evidence submitted by Kropz is beyond reproach.

[164] "One of the key principles of NEMA requires people and their needs to be placed at the forefront of environmental management − batho pele. It requires all developments to be socially, economically and environmentally sustainable". This statement could not explain the catastrophic situation in the country regarding the high unemployment rate better. The Kropz Phosphate mine could not have come at an opportune time than this. I take encouraged that the evidence before my sister and I, demonstrated that Kropz took concerted efforts

[268] 2007 (6) SA 4 (CC) (7 June 2007)
[269] Fuel retailers Association paragraph 60.

to comply with all the relevant legislations in their application for a mining right and subsequently the Integrated Water Use licence which is the subject of this baleful appeal and more so because the cornerstone of this appeal is pervaded by racial intendencies.

[165] Environmental activists remain very much relevant in society in relation to the protection of the environment. They can be a voice of reason when those who suffer from the scotoma of economic developments through the exploitation of mineral resources at the costs of the degradation of the environment move at the speed of light without considering the interests of future generations. They must however accept that their role is not to protect the environment to the stagnation of economic developments in the country. The mitigation steps which Kropz have put in place are sound and the philosophy behind them are traceable in the ground water management sector. One of the mitigating steps that Kropz put in regarding the dewatering of the mine pit and the artificial recharge was eloquently stated by Dr. Botha that not only had a risk-based assessment been undertaken at the time of the WULA, there was a continuous risk assessment in the form of emergency response plan that as 'a real time emergency response plan', in the form of the telemetry system which provided for the logging of operational data in real time in the control room of the mine, triggering alarms when required.[270] Reta G, Dong X, Zhonghua Li, in their research article titled "Environmental impact of phosphate mining and beneficiation: review" said the following regarding one of the successful mitigation of the impact of phosphate mine activities on water resources. "Establish automatic real-time hydrology and water quality monitoring strategy."[271]

[166] The critical role of Environmental activists should be implemented in a balanced manner so that they are seen as anti-development agents in the mining sector. Musodza WJT,[272] said the following in his master's dissertation, quoting the authoritative Professor Humby "Civil society frequently employs the concept of

[270] See Annexure B page 598
[271] Reta G, Dong X, Zhonghua Li, et al. Environmental impact of phosphate mining and beneficiation: review. Int J Hydro. 2018;2(4): at page 429.
[272] Musodza WJT; LLM Dissertation: "The One Environmental System: Did we get it right?" on page 7.

conservation to challenge developments, stating that it is detrimental to the environment, this is countered by the sustainable development concept."[273] This accurate analysis of behaviors of some of civil society organisation is being demonstrated by the manor in which members of the appellant opposed the granting of the mining right as well as the WUL to Kropz. For the reasons stated above, the appeal is dismissed.

[273] Humby T-L; 'One environmental system': aligning the laws on the environmental management of mining in South Africa' (2015) 33 Journal of Energy & Natural Resources Law, at page 128.

RULING ON THE APPEAL (ORDER)

It is ordered thus:

[13]. The appeal is dismissed.

[14]. The licence conditions as per the Water Use Licence No. 01/G10M/ABCGIJ/5296 that was issued by the Director-General of the Department of Water and Sanitation are amended to include all the following site-specific conditions as determined by the geohydrologist and adopted by the WUAAAC meeting held on 30 January 2017:

1. The quantity of water authorised to be taken (abstracted from the dewatering boreholes and pit) in terms of this licence may not be exceeded and may be reduced when the licence is reviewed.
2. The maximum composite use must be limited to the volume required by the mine under stringent demand management conditions. This determined volume must be the maximum licensed section 21(a). All remaining groundwater must be returned to the aquifer of origin in an unpolluted state.
3. An independent assessment must be carried out within 12 months from the date of issuance of this licence to determine the mine water demand considering strict demand management and they need to limit groundwater (pit water) consumptive usage.
4. The water from the pit sump must not be available for external users.
5. Water reporting to the pit in excess of their consumptive pit sump water use must be treated and returned to the aquifer of origin in such a state as to limit the impact on the water quality and also to limit the impact on long-term groundwater levels in the area.
6. This licence will be reviewed after twelve (12) months; twenty-four (24) months and based on the findings of the two reviews, every three (3) years thereafter.
7. The licensee is to fund an independent and comprehensive assessment of the impact of mining on the regional aquifer prior to the first licence review. The section 21(a) volume shall be reduced as determined by the assessment (up to 50% per licence review).
8. The licensee must establish, develop and implement a comprehensive and appropriate groundwater monitoring network and programme to determine

the impact, change, deterioration and improvement of the environment associated with the activities as well as compliance with the Water Use Licence conditions. It must be set as an early warning system to detect any influences of the dewatering and artificial recharge with special emphasis along the Elandsfontein paleo valley and pollution caused by seepage from the solid stockpile, softs stockpile and backfill. The date and time of monitoring in respect of each groundwater level and sample taken must be recorded together with the results of the analysis as well as other significant information (low flow, flooding, pollution incident, dry borehole, artesian, etc). Records must be kept as specified in the monitoring programme and reported to the Monitoring Committee on at least a six (6) monthly basis.

9. The licensee shall appoint a suitably qualified experienced independent external specialist who must be registered with SACNASP as a professional natural scientist to review all the monitoring reports on an annual basis to conduct an annual audit on compliance with the monitoring programme. Their review must be conducted within six months of this licence and a report on the audit shall be submitted to the responsible authority
10. The Licensee must evaluate potential impact areas around the site before mining below the water table takes place to assist in the identification of a suitable monitoring network and to collect baseline data should any long-term changes in the system occur.
11. The licensee must critically evaluate the data from the Department's monitoring boreholes to establish their suitability of acting as monitoring boreholes. Should they be found unsuitable new monitoring boreholes must be established.
12. A groundwater monitoring network and programme must be established immediately as per the proposed monitoring programme contained in the Water Use Licence Application. A programme containing any modification proposed by the Monitoring Committee must be submitted to the responsible authority within (6) months from the date of issuance of this licence for approval.
13. The licensee shall install and monitor appropriate water measuring devices to measure the amount of water abstracted, received and/or consumed, as applicable to the infrastructure. The licensee shall ensure that all measuring

devices are properly maintained and in good working order and must be easily accessible. This shall include a programme of checking, calibration, and/or renewal of measuring devices. The monitoring of the aquifer(s) during operation must be automated as far as possible, to avoid unnecessary data gaps and unreliable data. All water taken from the resource shall be measured as follows.

13.1. The daily quantity of water taken (from all dewatering boreholes and pit sump) must be metered or gauged and the total recorded at the last day of each month; and

13.2. The licensee shall keep record of all water taken and a copy of the records shall be forwarded to the responsible authority on or before 25 January and 25 July of each year.

14. Suitable measuring structures must be constructed upstream and downstream of each dam (Storm water dams and processing plant dam) to measure the flow entering and leaving the dams and this information must be available to the responsible authority.
15. Monitoring boreholes in the monitoring network must be clearly marked, numbered, and must be equipped with lockable caps and results must be submitted to the responsible authority. The Department reserves the right to sample monitoring boreholes at any time and to analyse these samples, or to have samples taken and analysed.
16. Daily rainfall must be measured on the site and recorded and a copy of the records shall be forwarded to the responsible authority on or before 25 January and 25 July of every year.
17. The quantity of water stored must be recorded continually.
18. The water balance of the mine inflows, groundwater levels and groundwater quality must be monitored to update the conceptual model and improve the confidence in the predicted impacts.
19. The Department must be notified beforehand if the mine plan or the artificial recharge schedule and/or programme is to be changed.
20. The monitoring requirements might change should the mine plan or the artificial recharge areas change. The monitoring network and/or programme must be updated in such a situation and submitted to the responsible authority for approval.

21. Monitoring points must not be changed without prior notification to and written approval by the responsible authority.
22. Records shall be kept as specified in the monitoring programme. These records, the data analysis and reporting shall be made available to the responsible authority and other relevant organisations as specified below:
    22.1. During operation a monitoring report must be prepared as specified in the monitoring programme and submitted to the Monitoring Committee or its legal successor;
    22.2. A copy of the report must be submitted to the responsible authority and
    22.3. Copies of the field sheets and digital data must be available on request.
23. The licensee is to ensure that measures are put in place for independent evaluation and verification of environmental performance relating to the monitoring of water resources and archiving of all data related to the operations, both during and post the life of the mine.
24. The licensee must ensure that a numerical model is developed and used to support the aquifer management and wellfield operation. The model will be used to inform adaptive management decisions such as amendments to abstraction rates or points for optimal groundwater use and management of the potential impact on other water users and the environment, especially the Geelbek, Langebaan Lagoon and Langebaan Road Aquifer.
25. Aquifer testing must be conducted within six (6) months of the date of issuance of this licence. The tests must be conducted for a long enough period (determined by a specialist, geohydrologist) to provide responses at observation boreholes in order to determine more accurate storage/storativity values. The updated data must be used to update the numerical model.
26. An updated hydrocensus must be conducted within six (6) months of the date of issuance of this licence to include an estimation of the groundwater discharge volumes and points and a representative sample of the boreholes covering the sub-catchment up to the lagoon, including the areas where the numerical model would be set up. The information and data must be used to update the numerical model, including the steady state calibration against

the discharge from the aquifer, to improve the prediction capability of the model.

27. The impacts on the Groen and Sout rivers must be incorporated into the numerical model.
28. All monitoring dewatering and artificial recharge boreholes that have not been logged between January 2015 and December 2016 must be logged with a pH, EC and temperature sonde and camera to confirm that depth and screen positions in the boreholes before groundwater dewatering commence. The information and data gathered must be used within the first 26 monthly updates of the numerical model.
29. The model will be updated on a six (6)-monthly-basis by the mine consultants (qualified geohydrologist). Data collected during the operational phase of the mine, drilling and aquifer testing data must be used to update the numerical model to improve the prediction capability of the model.
30. The following scenarios must be modeled every time as from the first updated numerical model:
    30.1. The current scenario,
    30.2. They projected scenarios every two (2) years or at periods to be specified by the monitoring committee and approved by the responsible authority for the life of the mine (including best case, likely case, worst-case scenarios).
    30.3 Projected scenarios for every two years and add periods to be specified by the monitoring committee and approved by the responsible authority for 50 years after mining and dewatering (including best case, likely case, worst case scenarios).
31. A geochemical study, including kinetic leach testing, adsorption testing, geochemical modelling and numerical transport modelling must be done to determine the aquifer material, Eh and pH conditions which play a role in the adsorption of Arsenic processes and to confirm the concentrations and impacts of Phosphorous, Fluoride, Arsenic, Uranium and Thorium on the Langebaan Lagoon and Geelbek.
32. Geochemical modeling is to include the shot-term and continuous plumb behaviour well into post closure once water levels returned to natural state.

33. Geochemical modeling is required to stimulate groundwater quality, special distribution for the life of the mine as well as the long-term post mining situation after natural flow conditions have returned.
34. A geochemical model report must be submitted to the responsible authority within one month of their finalisation of the geochemical model.
35. The effectiveness of proposed groundwater management and artificial activities compared to their modeled prediction must be continuously monitored and their model revised, updated and reported.
36. The licensee must attempt to prevent adverse effects on the water users. All complaints must be investigated by a suitable qualified person and if it is established that an existing lawful user's water supply or aquatic ecosystems are unacceptably impacted by this water use, authorised in respect of this licence, the licensee must initiate suitable compensative measures.
37. Polluted groundwater within the aquifer is to be contained within the boundaries of the mining operation both during and posed closer.
38. No mining-related hydro-chemical changes within the aquifer are permitted outside the mine site boundary.
39. Dewatering boreholes have to be continuously monitored for traces of pollution. No polluted water is to be reinjected into the artificial recharge process. The water must be returned below the groundwater table and in such a state that there is no impact on the ground water chemistry down gradient of the site.
40. Comprehensive baseline chemistry for the mining area and surround SANParks and the Langebaan Lagoon must be provided in a report to the Department before the watering and injection operations commence. Each sample must be analysed at a SANAS accredited laboratory for at least the variables shown in Table 1 (page 3478 of RoD) and Table 2 (page 3478-79) and any other identified elements of concern. All elements of concern are to be analysed and reported on, including heavy metals.
41. The quality of the resource must be monitored by taking samples quarterly at groundwater monitoring points within the monitoring network. Each sample must be analysed at an SANAS accredited laboratory for at least the variables and at frequencies, as shown in the table below and/or any

other variable as may be required from time to time by the responsible authority.

42. The date, time, and monitoring point in respect of each sample taken shall be recorded together with the results of the analysis.
43. An increase concentration trend of any element is to trigger investigation and mitigation prior to reaching threshold values identified in the monitoring programme.
44. If groundwater pollution has occurred or may possibly occur as a result of activities authorised in this licence, the licensee must immediately conduct the necessary investigations and implement additional monitoring and rehabilitation measures which must be to the satisfaction of the responsible authority.
45. Acceptable and suitable areas must be identified for additional boreholes and additional injection areas should it be necessary to spread the artificial recharge to limit the rise in water levels. The feasibility of these areas must be assessed. The information on the additional boreholes and additional injection areas must be provided to the Department for approval before any drilling takes place.
46. Monitoring of water levels and management of the injection rate into the boreholes must be done on a continuous basis.
47. Warning and critical groundwater levels must be set to limit seepage zones and must be submitted within two (2) months from the date of issuance of this licence.
48. An emergency response plan, should the artificial recharge process be less efficient than anticipated and result in surplus water, must be submitted within two (2) months of issuance of this licence.
49. The monitoring programme must be designed to detect any changes along the flow path. Sampling of specific horizons in the aquifer must be done to determine the influence of shallow and deep aquifer conditions on the transport of potential contaminants.
50. Monitoring for Arsenic concentrations must be done within one kilometer (1km), two kilometres (2km) and three kilometres (3km) from the potential Arsenic sources.
51. The Arsenic mobility and adsorption percentage must be monitored.

52. Data loggers with live data on a website must be used for the most important boreholes. Access to the data must be obtained via a web login and SANParks and the Department must have access to this data.
53. Weekly hand readings must be collected at the remainder of the boreholes. Data loggers with manual download must also be downloaded during monitoring rounds.
54. Water quality samples must be collected on a monthly basis. Field readings of Eh, pH and EC must be included. Parameters analysed must include PO4, As, F, U and Th.
55. Borehole profiling of all boreholes specified in the monitoring programme, for EC, temperature, Eh, pH and dissolved Oxygen must be done at least on a six (6) monthly-basis, or as specified in the monitoring programme, and a report on the findings must be submitted to the responsible authority annually.
56. The borehole monitoring and maintenance procedures must be implemented as per the proposed borehole monitoring and maintenance procedures proposed by SRK to Elandsfontein Exploration and Mining (Pty)Ltd. A programme containing any modifications proposed by the monitoring committee must be submitted to the responsible authority within six (6) months from date of issuance of this license for approval.
57. An annual hydrogeological report providing a comprehensive assessment of the response of the aquifer to operations must be submitted to the responsible authority. Recommendations for mitigation of any negative impacts are to be provided and implemented as required.
58. Quarterly monitoring reports must be compiled and submitted to the Department within two (2) months after each quarter.
59. Monitoring data must be available to a local water user association or forum who can evaluate the data.
60. Management response groundwater levels and groundwater quality must be established in collaboration with the Department.
61. Groundwater level and quality responses must comply with any specified management response levels.

62. Warning levels regarding the minimum and maximum warning levels for groundwater level and water quality changes need to be quantified and included in the monitoring programme for approval by the Department.
63. Groundwater level and quality warning levels must be adhered to.
64. Monitoring data for the EEM operations must be collected specifically to improve the predictions towards the Langebaan Lagoon during future model updates.
65. The licensee must at all times prevent contamination of the environment, by the provisions of suitably designed impermeable site underlay systems and drainage arrangements.
66. The licensee must at all times prevent the contamination of the environment, by providing a suitably designed impermeable site underlay systems and drainage arrangements.
67. Preventative actions must be provided to ensure that there is no pollution beneath the soft stockpile. Monitoring is to be put in place to detect any such pollution.
68. The geochemical characteristics of the slime backfill must be provided within three (3) months of the date of issuance of this license.
69. The licensee must embark on a systematic long-term rehabilitation programme to restore the watercourse(s) to environmentally acceptable and sustainable conditions after completion of the activities.
70. All disturbed areas must be re-vegetated with an indigenous seed mix in consultation with an indigenous plant expert, ensuring that during rehabilitation only indigenous shrubs, trees and grasses are used in restoring the biodiversity.
71. An active campaign for controlling invasive species must be implemented within disturbed zones to ensure that it does not become a conduit for the propagation and spread of invasive exotic plants.
72. Rehabilitation must be concurrent with the construction and operational phase.
73. A photographic record must be kept as follows and submitted with reports as set out in section 2:
    73.1. Dated photographs of all the sites to be impacted before any further construction commences after the date of the issuance of this licence;

73.2. Dated photographs of all the sites during construction monthly; and

73.3. Dated photographs of all the sites after completion of construction, seasonally.

74. The licensee must supply proof to the Department of sufficient financial security within twelve (12) months from the date of issuance of this licence and include the following actions:

74.1. Independent assessment of mining impact prior to each licence review,

74.2. Maintaining of monitoring wins in the long-term for continued monitoring of the wells and

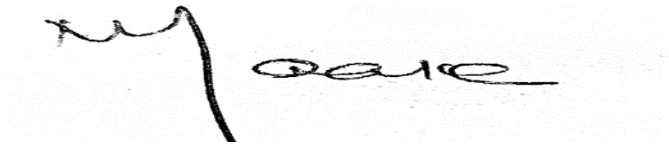
74.3. Remediation in the event of pollution being detected beyond the boundary of the site. This security is required over and above any financial requirements that need to be provided under mining and environmental legislation.

75. The data collected throughout the operational phase should be used for post-closure planning and to determine the extent and frequency of post-closer groundwater level and -quality monitoring.

76. No expansion of the mine operation, outside the boundaries of this licence, is allowed before a strategic environmental assessment of the impact of the mining on the aquifer system as a whole and on the environment has been completed.

[15]. No cost order is made; each party carries the costs for its legal fees.

Thus, handed down in Pretoria on 12 November 2021.



Adv. Ntika Maake

Chairperson of the Panel and of the Water Tribunal

For the Appellant:	Adv. L. Ferreira Instructed by Youens Attorneys
For the First and SECOND Respondent:	Adv. R. Ramawela SC. Adv. K. Makgano Instructed by the State Attorney Pretoria
For the Third Respondent:	Adv. S. Rosenberg SC Instructed by Werksmans Attorneys.