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The legal designation of ecologically important areas

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During March 2017 the Supreme Court of Appeal of South Africa handed down a decision ensuring the continued environmental protection of the Makhonjwa Mountains in Mpumalanga (also known as the Barberton Greenstone Belt).

The court was tasked to decide if the ecologically important area enjoys protection as a "protected area" in terms of the National Environmental Management: Protected Areas Act (NEMPAA). This was necessary despite the area being placed on South Africa's tentative list of world heritage sites in 2008, and despite the provincial government taking three separate actions in 1985, 1996 and 2014 to ensure that the Makhonjwa Mountains were protected.

The legal challenge arose in the case of *Mpumalanga Tourism and Parks Agency v Barberton Mines (Pty) Limited*.

Barberton Mines was granted a prospecting right in terms of the Minerals and Petroleum Resources Development Act (MPRDA), only for the Parks Agency to prevent them from starting with their prospecting activities based on the assertion that their prospecting right was invalid and fell to be set aside because it was granted over land that formed part of a protected area.

Barberton Mines launched a court application in the North Gauteng High Court, which found that the Makhonjwa Mountains didn't enjoy environmental protection under NEMPAA. The court granted an order affirming the company's rights to prospect in the area and ordering the Parks Agency not to prevent or interfere with the company's prospecting activities.

The Parks Agency took the High Court's decision on appeal, arguing that the Makhonjwa Mountains enjoyed protection under NEMPAA because they are a declared, or designated, protected area. This protection prohibits anyone from conducting commercial prospecting or mining within its boundaries.

Barberton Mines counter argued that the actions taken by the provincial government in 1985, 1996 and 2014 were insufficient to declare the Makhonjwa Mountains a protected area. It argued that the 1985 resolution was invalid because it was not issued by the correct authority or published as required, and that the 1996 proclamation was void because it did not adequately describe the area – the resolution only identified the area as "Barberton Nature Reserve", without any accompanying map or detailed area description.

The Supreme Court of Appeal affirmed that NEMPAA binds the state and trumps any other legislation if there is a conflict on the management or development of protected areas - if an area is validly declared or designated a protected area, then prospecting operations in the area are prohibited.

The only question that the court had to decide was whether the Makhonjwa Mountains were validly declared as a "protected area" as contemplated by NEMPAA. For this, the court placed emphasis on the 1996 proclamation, finding that it was sufficient to be considered a "declaration" or "designation" required by NEMPAA, albeit that this declaration took place before NEMPAA came into force. The court then turned its attention to Barberton Mines' argument, and the High Court's finding, that this proclamation must be found to be void because its description of the area was vague.

The court considered previous cases that dealt with actions to declare laws void for vagueness, including a 1955 Appellate Division that held that "[t]he degree of certainty, clarity or precision that must be present … depends on the circumstances. … The law requires reasonable and not perfect lucidity …", and a 2006 Constitutional Court case that added that "[t]he doctrine of vagueness must recognise the role of the Government to further legitimate social and economic objectives [a]nd should not be used unduly to impede or prevent the furtherance of such objectives".

The court stated that common sense must prevail, finding that the 1996 proclamation did not need a "faultless description couched in meticulously accurate terms in order to be valid", only that the area should be indicated with sufficient certainty.

The court noted that the provincial government had given a particular meaning to the "Barberton Nature Reserve" since 1985. Because the 1996 proclamation is related to the detailed 1985 resolution it couldn't be argued that people wouldn’t know what area the 1996 proclamation refers to. It is therefore valid for the 1996 proclamation to refer to the area only by name without detailing the exact area description.

The common sense approach adopted by the court is ultimately correct, because minor errors in a government declaration shouldn’t prevent the government bodies from performing their important constitutional duties and achieving their social and economic objectives. The nature of the error is, however, an important consideration. In this case it had no real effect on the public's ability to understand the declaration, but this does not mean that the court would turn a blind eye to an error that truly introduces uncertainty.

The Parks Agency's appeal was ultimately successful, effectively preventing Barberton Mines from conducting prospecting in the area, which, if not certain before, is now a confirmed "protected area" under NEMPAA.

On a side note, the Supreme Court of Appeal appears to have endorsed the view that mining operations in a protected area might be permitted under the MPRDA if the activities are in the national interest. The court wasn’t asked to decide this issue, but this may be an area of the law open for future debate.

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