

To be or not to be a protected area: a perverse political threat

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Background: On 15 January 2021, a South African Member of the Executive Committee (MEC) for the Environment amended the Mabola Protected Environment's (MPE) boundaries to remove legal impediments preventing coal mining in this protected area. This decision came in the wake of the MPE being declared a protected area and a series of court cases ending at the Constitutional Court.

Objective: The objectives of this paper were: (1) evaluate the potential consequences of the MEC's decision for South African protected areas; (2) speculate on the possible impact on South Africa's reputation in terms of its commitment to safeguarding its protected areas; (3) identify possible weaknesses in the National Environmental Management: Protected Areas Act 57 of 2003 (NEMPA); and (4) make recommendations to strengthen this Act so that it can reduce the vulnerability of protected areas to arbitrary and prejudicial decision-making.

Methods: This study involved an evaluation of NEMPA and the notice in the Provincial Gazette declaring and giving effect to the MEC's decision, and of the various High Court judgments leading up to and following the publication of this notice.

Conclusion: The decision by the MEC highlights the vulnerability of protected areas and the importance of the conservation of biodiversity, particularly in a context of parochial or partisan objectives and profit-vested interests that are of a limited (at least in the medium- to long-term) public benefit. It is concluded that the discretionary clauses in NEMPA may need to be amended to limit or refine the discretion politicians may apply.

Introduction

Protected areas are deemed to be the bastions of biodiversity conservation and the core of the natural environment held in trust for the benefit and enjoyment of current and future generations (Blackmore 2020; Lubbe 2019; Radeloff et al. 2010). It is therefore not unreasonable to assume – at least from a principle perspective – that protected areas, once established, would persist *ad infinitum* and that their biodiversity would be protected from at least human-induced harm (Hoffmann & Beierkuhnlein 2020; Qin et al. 2019). The corollary is that each generation would, in turn, inherit a network of protected areas that contains viable components of the country's biodiversity (Mogale & Odeku 2018; Zurba et al. 2020). Thus, in addition to being a custodian or trustee, there is an expectation that each generation would increase the number and size of the existing protected areas to a point where, as a minimum, the network of protected areas contains a viable representation of the country's biodiversity. Thus, the decisions taken in one generation have a direct consequence not only for that generation, but also for future generations (Lubbe 2019). The longevity of a protected area is, therefore, founded on the trustee's ability to safeguard (protect) the area.

While the meaning of a protected area has been defined in many texts, the concept of being protected is rarely, if at all, defined. Consequently, the common interpretation of the term is used. Collins online dictionary defines protected as 'forbidden by law to be harmed', while the Merriam-Webster online dictionary defines the term as 'to cover or shield from exposure, injury, damage, or destruction, or to maintain the status or integrity of especially through financial or legal guarantees'. It is reasonable, therefore, to assume that in the context of this paper, 'protected' means that the protected area must be safeguarded from being damaged, diminished, attacked, stolen, injured, lost, and the like. Furthermore, strict application of this interpretation would, in principle, result in the protected area persisting and fulfilling the purpose for which it was established over time.

Despite this understanding, regulatory bodies have not embraced the need of a protected body to persist *ad infinitum*. For instance, the International Union for Conservation of Nature (IUCN) defines a protected area as 'a clearly defined geographical space, recognised, dedicated and managed, through legal or other effective means, to achieve the *long-term conservation* of nature with associated ecosystem services and cultural values' (author's emphasis).

The inclusion of the term '[in] the long-term' suggests that the IUCN envisioned that the life of a protected area, although unknown, is finite but persists beyond the foreseeable future (or beyond the short to medium term) (Blackmore 2020). It is, therefore, conceivable that the IUCN conceptualised, for whatever reason, that a protected area may be established for an extended period, during which time the integrity of the biodiversity (and other values therein) is shielded from, at least, anthropogenic harm and with a future possibility of it being discontinued. The corollary is that while the protected area is in existence, it is maintained and protected in a fit state – i.e., it fulfils the purpose for which it was set aside as a protected area by its trustee or trustees. Here the trustee would comprise the state and, if different, the management authority.

The trustee role of the state would be to provide the necessary governance instruments (legal and policy framework) for the establishment and management of the protected area. In contrast, the trustee role of the management authority would be to give effect to day-to-day management of the protected area in accordance with, at least, these governing instruments (Goosen & Blackmore 2019). Thus, on establishing a protected area and following the assignment of a management authority, the state assumes an oversight role to ensure that the integrity of the protected area is reasonably safeguarded in the public interest by the management authority (Atmîş 2018). In a South African context, the oversight role would be primarily exercised

in accordance with the National Environmental Management: Protected Areas Act 57 of 2003 (NEMPA).

NEMPA provides for several kinds of protected areas that may be established in South Africa. This array extends from giving protection to one or more natural or cultural features (e.g., a protected environment) to prohibited access by people save for that required under exceptional and necessary circumstances (e.g., a special nature reserve). A summary of the kinds of protected areas in South African law is provided in Fugle and Rabie (Strydom & King 2009). The origin of a 'protected environment' is rooted in the Protected Natural Environment (PNE) in the Environment Conservation Act 73 of 1989 (ECA)(RSA, 1989). This component of the Act was repealed by the NEMPA, which redefined the 'Protected Natural Environment' to 'Protected Environment'(PE) to cater for cultural attributes needing protection. Nonetheless the erstwhile PNE and current PE purpose remained unchanged. This being to 'enable private landowners to take collective action to protect one or more attributes of their properties' (Blackmore 2022).

Discussion

The plight of protected areas

Despite the legislative instruments, protected areas and the biodiversity therein suffer from many threats that extend from unsustainable use of natural resources to mismanagement or improper conservation management, to encroachment by incompatible land-use change and development, and to climate change (Coppa et al. 2021; Hoffmann & Beierkuhnlein 2020; Mascia & Pailler, 2011; Prato & Fagre 2020). These threats, either individually or cumulatively, may lead to the loss of a protected area function (viz. a paper park) or the loss of part or all of the protected area through deregistration or degazettement (De Vos et al. 2019; Mascia & Pailler 2011; Qin et al. 2019).

The need for a protected area to at least be downsized or degazetted in recent protected area jurisprudence and statute law, has twinned the need for the establishment of new protected areas and the expansion of existing ones. Such provisions provide the relevant state authority – particularly the political head – with the powers to act and make decisions in the State's and therein the public's (current and future generations) best interests. The establishment and formalising of a protected area in law are generally conditional: the parcel of land needs to meet particular biodiversity or ecosystem standards or requirements. In contrast, the withdrawal of a parcel of land from the protected area estate invariably occurs without any significant limitation or challenging legal restriction (see, for instance, Mascia & Pailler 2011).

Protected area downgrading, downsizing, and degazetttement (PADDD)

In South Africa, the withdrawal of a protected environment, special nature reserve, national park or nature reserve belonging to the state requires the oversight and a resolution of the relevant national or provincial legislature. In contrast, a boundary of a marine protected area may be amended, or the declaration may be withdrawn at the sole discretion of the (national) Minister responsible for the environment. A similar circumstance applies to private nature reserves or where private land has been incorporated into a national park. In this instance, the relevant political head (the national Minister – the Minister; or the Member of the Executive Committee, also commonly referred to as the ‘provincial minister’ – the MEC) for the environment must, without consideration, degazette the private land on receipt of a notice from the landowner requesting this (See Chapter 5 – RSA 2004). Thus, the long-term security of these protected areas must be questioned in that the persistence of the protected area is vulnerable to the discretion of a political head or landowner.

While the politicians involved in the degazetting of a parcel of land or sea are obligated to act as a trustee of South Africa’s protected areas (see Section 3 – RSA 2004), the NEMPA is silent on the consequences should this obligation be disregarded. Furthermore, while the Act is explicit on the circumstances and criteria that need to be met for either a terrestrial or marine protected area to be declared, it is silent on the circumstances under which degazetting may occur. Thus, other than the obligation to act as a trustee of protected areas – a provision of NEMPA that is possibly the least understood (Blackmore 2018; Van der Schyff 2010) – there is no explicit provision in NEMPA that binds the political head and the relevant legislature to ensure that the downsizing or degazetting of a protected area does not compromise the objective and intent of this Act. Nonetheless, the fulfilment of the trustee obligations with respect to downsizing or degazetting of a protected area and maintaining the integrity of the public trust entity (the network of protected areas in South Africa) has taken place in this country’s recent conservation history. For example, the Vaalbos National Park was degazetted to grant successful land claimants’ beneficial occupation of the properties that comprised that protected area. To compensate for or offset this loss to the public trust entity, the Minister gazetted the establishment of the Mokala National Park (SANParks 2021).

As with the marine protected areas and private nature reserves, the amendment of the boundaries or withdrawal of a protected environment is not overseen by the national or provincial legislature. The political head

for the environment may, therefore, notwithstanding the public trust obligation:

- a. ‘withdraw the declaration [...] of an area as a protected environment or as part of an existing protected environment; or
- b. exclude any part of a protected environment from the area’ (Section 29 of NEMPA).

These provisions in NEMPA provide the foundation in South African protected area law, as argued below, for decisions of what de Marques and Peres (2015) described as a ‘pervasive legal threat to protected areas’ in Brazil. In this instance, de Marques and Pere (2015) discovered that the Brazilian legal system was correctly being used, in a disingenuous manner, to ‘degazette, downsize or downgrade’ several the country’s protected areas. Furthermore, de Marques and Peres (2015) discovered that the underlying reasons for such actions were to accommodate state infrastructure, relax restrictions on land use or the use of natural resources by people, or as a result of ‘conflicting interests with the wider private sector’ (de Marques & Peres 2015). Invariably, the degazetting, downsizing or downgrading of a protected area results in environmental degradation and a concomitant irreversible loss of the protected area’s values (Mascia & Pailler 2011). In the absence of physical compensation (biodiversity and protected area offsetting), the protected area public trust entity would be diminished by the loss of part or all of the protected area (Blackmore 2020).

Continuing with the protected environment example, and with reference to the Mabola Protected Environment near Wakkerstroom in Mpumalanga, South Africa; section 48(1)(b) of NEMPA renders it illegal to either prospect or mine in this type of protected area without, among other things, the written permission granted by the Minister for the Environment having consulted the Minister for Mineral Resources. Furthermore, the Minister responsible for the environment may refuse permission or grant such subject to any condition or set of conditions that would be required to reduce the potential impacts of the proposed prospecting or mining on the protected environment to a reasonably acceptable level. Thus, depending on the sensitivities of the protected environment and the effectiveness of mitigation, an application for either a prospecting or mining activity may be refused or burdened with conditions, including securing an offset for both the residual damage to biodiversity and the integrity of the protected area estate (Blackmore 2020).

The MEJCON Judgment

In 2014, the Mabola Protected Environment (MPE), located in the Enkangala–Drakensberg Strategic Water Source Area, was established to protect grasslands deemed to be of exceptionally high biodiversity value.

This Strategic Water Source Area is one of 22 such areas in South Africa and provides water to two metropolitan areas and several towns and agricultural regions in three provinces. Notwithstanding this irreplaceable biodiversity status of the MPE and its critical water provision function, together with the apparent irreversible damage that may be caused, the then Minister of Environmental Affairs, on 21 November 2016, issued the environmental authorisation for Uthaka Energy (PTY) Ltd to undertake coal mining activities. The following day, a mining right was granted by the then Minister of Mineral Resources (Davis 2021). The decisions taken by both these Ministers were later set aside on the grounds, among others, that the Ministers failed to fulfil the requirement of section 48 of NEMPA as discussed above (MEJCON Judgment 2018).

The litigants (appellants) were a consortium of non-governmental organisations (NGOs) comprising the Mining and Environmental Justice Community Network of South Africa, Groundwork, Birdlife South Africa, Endangered Wildlife Trust, Federation for a Sustainable Environment, Association for Water and Rural Development, and the Bench Marks Foundation.

Whereas the respondents were Uthaka Energy (PTY) Ltd the MEC for Agriculture, Rural Development; the Minister of Mineral Resources and Energy; the Acting Chief Director for Environmental Affairs; the Mpumalanga Department of Agriculture, Rural Development, Land and Environmental Affairs; Gert Sibande District Municipality; Dr Pixley Ka Isaka Seme Local Municipality; the Water Tribunal; Estate Late Pierre William Bruwer Uys; Occupiers Of Portion 1 of The Farm Yzermyn 96 HT; the Voice Community Representation Council; the Mabola Protected Environment Landowners Association; the Mpumalanga Land and Environmental Affairs and the Minister of Environment, Forestry and Fisheries. This interdict focussed primarily on preventing Uthaka Energy (PTY) Ltd from undertaking any mining activities. The remainder of the respondents are those parties the litigants believed may be able to provide information to the court should the need arise and need to be bound by the judgement. These respondents may also oppose the interdict and hence may, vis-à-vis be liable to pay the litigants legal costs.

Uthaka Energy (PTY) Ltd followed the issuing of the MEJCON Judgement with a series of court applications for leave to appeal the MEJCON Judgment, which ended up being refused on 9 July 2019 by the President of the Supreme Court of Appeal. A similar dismissal with costs was issued by the Constitutional Court on 6 November 2019, ending the efforts of Uthaka Energy (PTY) Ltd to have the MEJCON Judgment set aside. The sequential consequence of these judicial endeavours is that the six orders in the judgment stand and would be binding on, among others, Uthaka Energy (PTY) Ltd and (importantly) the Mpumalanga MEC for Agriculture,

Rural Development, Land and Environmental Affairs. The orders of the MEJCON Judgment are:

1. 'The decision of the first respondent [Minister of Environmental Affairs] on 20 August 2016 to grant the third respondent [Atha-Africa Ventures (Pty) Ltd – predecessor to Uthaka Energy (PTY) Ltd] written permission to conduct commercial mining in the Mabola Protected Environment in terms of section 48(1)(b) of the National Environmental Management: Protected Area Act 57 of 2003 ('NEMPA') is reviewed and set aside.
2. The decision of the second respondent on 21 November 2016 to grant the third respondent written permission to conduct commercial mining in the Mabola Protected Environment in terms of section 48(1)(b) of NEMPA is reviewed and set aside.
3. The third respondent's application for written permission to conduct commercial mining in the Mabola Protected Environment in terms of section 48(1)(b) of NEMPA is remitted to the first and second [Minister of Mineral Resources] respondents for reconsideration.
4. In reconsidering the third respondent's application for written permissions to conduct commercial mining in the Mabola Protected Environment in terms of section 48(1)(b) of NEMPA, the first and second respondents are directed to consider all relevant considerations and:
 - 4.1. to comply with section 2 and 4 of the Promotion of Administrative Justice Act 3 of 2000;
 - 4.2. to take into account the interests of local communities and the environmental principles referred to in section 2 of the National Environmental Management Act 107 of 1998 ('NEMA');
 - 4.3. to defer any decision in terms of section 48(1)(b) of NEMPA until after the decision of
 - 4.3.1. the applicants' statutory appeal to the Director General: Department of Mineral Resources in terms of the Mineral and Petroleum Resources Development Act 28 of 2002 against the approval of the third respondent's environmental management programme; and
 - 4.3.2. the applicants' statutory appeal to the Water Tribunal in terms of the National Water Act 36 of 1998 against the decision to issue a water use licence to the third respondent;
 - 4.4. not to consider the granting of permission to conduct commercial mining in the Mabola Protected Environmental in terms of section 48(1)(b) of NEMPA until a management plan

for the MPE has been approved by the fifth respondent in terms of section 39(2) of NEM-PAA and to consider the contents thereof.

5. In the event that, prior to the completion of the reconsideration contemplated in paragraphs 3 and 4, the fifth respondent [MEC for (the political head for the Department of) Agriculture, Rural Development, Land and Environmental Affairs, Mpumalanga] decides in terms of section 29(b) of the National Environmental Management: Protected Areas Act 57 of 2003, to exclude the farms referred to in Provincial Notice 127 of 2018 ('Gazette notice'), from the Mabola Protected Environment, any party may apply to Court on the same papers, duly supplemented, on notice to the other parties, for an order varying paragraphs 3 and 4 or granting such alternative, further or interim relief as may be just and equitable in the circumstances.
6. The first, second and fifth respondents are directed to pay the applicant's costs of this application, jointly and severally on the attorney and client scale, the one paying the other to be absolved, such costs to include the costs of two Counsel.' (Davis 2021).

In the arguments leading up to the above six orders, Justice Davis recognised the potential of the mine creating economic benefits that, amongst others, include the employment opportunities for the neighbouring communities. While economic employment remains a key consideration, it must be viewed within the context of the environmental right discussed below (Davis 2021). Justice Davis further argued, while economic hardship is tragic, the interdict is 'temporary in nature' and hence would not add to the economic hardship that has been in place for many years, and the mine would not 'miraculously' create instant economic relief and therein immediately 'solve or alleviate' the community's problems (Davis 2021). Thus, the granting of the interdict merely suspends the potential of the economic benefits the proposed mine may create, until such time the rule of law has run its course.

The Shongwe Notice

With these orders in place and binding on the MEC (and despite Order 5 enabling aggrieved parties to take the MEC's decision on judicial review), the MEC elected on 8 December 2020 to amend the boundaries of the MPE to exclude four of the six properties from the MPE. This boundary amendment was published in the Provincial Gazette (PG 3225 of 15 January 2021 – the 'Shongwe Notice'). Furthermore, the four properties excluded from the MPE coincided with those listed in the mining application (Davis, 2021).

In the Shongwe Notice, the MEC cited the following rationale for the decision to amend the MPE boundaries:

1. *'To ensure balance towards use of natural resources for socio-economic benefits of all the citizens/community of Pixley Ka Seme Local Municipality and the country, while promoting environmental protection and sustainability;*
2. *To ensure/promote economic growth of the country and the community of the area;*
3. *To promote co-existence of mining activities and conservation within the area on the properties, the boundaries of which are as indicated on addendum 1 and 2 hereto.'* (Shongwe Notice 2021).

An analysis of the Shongwe Notice is moot in many respects. The entire environmental application and the granting of the mining rights (including a plethora of yet to be considered environmental, mining and municipal appeals) are subject to judicial review. At the time of writing this paper, these cases had not been heard by the High Court.

The rationality and reasonableness of the Shongwe Notice can only be confirmed by the courts when taken under judicial review, which has been set in motion as a consequence of the interdict granted on 30 March 2021 by Justice Davis (Davis 2021). To make a determination that sets the Shongwe Notice aside, the High Court will need to be convinced that the decision to issue the Notice was unreasonable given the circumstances, was founded on an improper purpose or motive, or was irrational, arbitrary or capricious. Until such time a determination is made, any evaluation of the integrity of the Shongwe Notice is speculative.

It is an enigma why the MEC did not use the opportunity to include in the notice information germane to the justification of the rationale. This information would be available, at least, in the social component of the environmental impact assessment and associated application documentation. Despite having ready access to this information, the challenge facing the MEC would be to demonstrate that the benefits alluded to in the Notice significantly outweigh the potential social, water, biodiversity and other impacts the proposed mine is likely to cause. Having not done so, unfortunately renders the Shongwe Notice vague and unsubstantiated, which brings into question whether it is reasonable and justifiable. Nonetheless the notice needs to be read as it is published and in so doing cannot be given any greater status than an 'opinion' (Alison et al. 2003; Watson 1984).

Furthermore, the rationale provided by the MEC presupposes, in some respects, the outcome of the reconsideration of the mining application by both the Ministers, and particularly the Minister for Environment, as well as the various appeals and judicial reviews. The outcome of these processes may conclude that the mining activity, as applied for, is sustainable and in the

country's best interests. Thus, by issuing the notice, the MEC appears to have displayed significant apprehension that this outcome is unlikely.

A perverse threat to protected areas

Given the judgements discussed above and the absence of detail justifying the rationale, the *prima facie* conclusion one draws from the publication of the Shongwe Notice is that it was impulsive with the intention to remove the restrictions preventing Uthaka Energy (PTY) Ltd from mining within the MPE by:

1. evading or circumventing the need for the permissions that are to be granted by both the Minister for the Environment and the Minister for Mineral Resources, for Uthaka Energy (PTY) Ltd to mine the Mabola Protected Environment, and
2. ameliorating the judicial failures of Uthaka Energy (PTY) Ltd to appeal the MEJCON Judgement (CER, 2021).

Should the High Court come to the same conclusion, and taking into consideration that the notice, in its current form, is insubstantial, it is highly likely that the Shongwe Notice will be set aside, at least, on the grounds of being irrational, arbitrary and/or capricious (Watson 1984). Moreover, this consideration, in combination with the vague and unsubstantiated nature of the Notice, dispels the notion that PADDD was used in a manner it was intended to be used. This argument is amplified below.

Nonetheless, the question that arises is whether the MEC, by issuing the Shongwe Notice, acted logically and in accordance with the provisions of NEMPA? The MEC drew on section 29 of NEMPA, which granted, when viewed in isolation from the remainder of the Act, unfettered powers to amend the boundary of a protected environment. Thus, the MEC's action from this perspective is compliant with this section of the Act. However, this strategy is precarious in that the decision taken must be in the context of the intent and purpose of the Act, and therein the roots of the Act in the Constitution. The context of the Act is established primarily in the preamble, followed by section 2 (Objectives of the Act) and section 3 (State trustee of protected areas). Simply put, the preamble and the objectives to the NEMPA provide for: (1) an appropriately governed system of protected areas for the protection of 'ecologically viable areas representative of South Africa's biological diversity and its natural landscapes and seascapes,' and (2) these areas to be sustainably used 'for the benefit of people, in a manner that would preserve the ecological character of such areas'. The plurality of 'people' infers that the benefits derived from a protected area cannot be arbitrarily limited to one person (or entity), a limited group of people, or one generation – to the exclusion of the next.

The benefit of protected areas cumulating to all people is further embraced by section 3(a) of NEMPA, where the State, in this instance the MEC, is to act as the trustee of Mpumalanga's protected areas. In establishing and safeguarding a protected area, the MEC would be contributing to the progressive fulfilment of section 24 (the 'Environmental Right') in the Bill of Rights of the Constitution. The role of a 'trustee' in this context is similar to a trustee administering common law trusts. The duty of trustees is centred on the obligation to administer the trust solely in the interest of the trust's beneficiaries. It is, therefore, the obligation of the trustees to, as a minimum, safeguard the integrity of what is held in trust – the trust entity. Any decision taken by the trustees that can harm the trust entity must, therefore, be cautiously taken and with prudence. For circumstances where a decision results in a loss in value or integrity, the trustees must, to the best of their abilities, ensure that the trust entity is compensated for the loss.

The Environmental Right in the Constitution reads as follows:

Everyone has the right—

- to an environment that is not harmful to their health or well-being; and*
- to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that—*
 - prevent pollution and ecological degradation;*
 - promote conservation; and*
 - secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.*

It, thus, makes sense that the three points in the MEC's rationale must, at least, reflect the common law duties placed on trustees and, therein, fulfil the intention and purpose of NEMPA and the Constitution.

Catapulting South Africa into the negative realm of PADDD

It is recognised that there are valid circumstances where PADDD is necessary. For instance, to remove redundancy or where a portion or all of the protected area does not meaningfully contribute to the conservation of biodiversity, or where greater accuracy of the contribution of protected areas to biodiversity conservation is required (Cook et al. 2017). PADDD may also be required where the loss of part or all the protected area is required for justifiable and critically important development or land use change that is (at least in the medium- to long-term) overridingly in the public's best interests. In these circumstances, the loss

of biodiversity and the protected area estate would need to be compensated or offset in a manner that is equally overriding in favour of biodiversity conservation (Blackmore 2020). These conditions for the use of PADDD do not fit comfortably, if at all, with the amendment of the MPE boundaries.

By issuing the Shongwe Notice, it is evident that the MEC, *inter alia*:

- a. attempted to circumvent the National Ministers' consent obligations,
- b. ignored his public trust and other obligations bestowed on him by the NEMPA,
- c. attempted to nullify the MEJCON judgment – an outcome Uthaka Energy (PTY) Ltd was not able to achieve by approaching the Senior Court of Appeal and the Constitutional Court,
- d. undermined the pending judicial and appeal processes that are yet to be finalised, and
- e. following on from the above two points, displayed a lack of confidence in the rule of law.

In view of this, it may be easily concluded that the action taken by the MEC was an inappropriate use of his powers – perverse in that the MEC used a discretionary provision in NEMPA to set aside the intent and purpose of the Act.

Should this be the case, the MEC may have catapulted South Africa into the ranks of Brazil and other countries where protected areas are purposefully being downgraded, downsized and degazetted to pave the way for achieving, what appears to be, parochial or partisan objectives and profit-vested interests (Blackmore 2015; de Marques & Peres 2015; Qin et al. 2019; Treves et al. 2019).

Conclusion

In 2014, the then Minister of Environmental Affairs and the Minister for Mineral Affairs gave their individual permissions for mining to take place in Mabola Protected Environment and did so in non-compliance with the provisions of the National Environmental Management: Protected Areas Act 57 of 2003 (NEMPA). This is the principal statute that safeguards, *inter alia*, protected environments. Drawing primarily on this non-compliance, Justice Davis, in the High Court, set both these approvals aside and instructed the Minister of Environmental Affairs to reconsider the application to undertake mining in the Mabola Protected Environment once the provisions of this statute had been complied with.

Following the Senior Court of Appeal's and the Constitutional Court's refusal of the mining company's request to appeal the Justice Davis decision, the Member of the Executive Committee (MEC), the provincial political head for the environment, in 2020, surprisingly, elevated his authority above that of the Courts and the responsibilities of the national Minister.

Furthermore, by using a discretionary clause in NEMPA in isolation to the other key provisions of the Act, the MEC amended, in what appears to be an arbitrary and capricious decision, the boundaries in a protected environment to circumvent a statutory prohibition of mining, as well as a series of orders issued by the High Court. Other than South Africa being seen to be pushed into the negative realm of 'protected area downgrading, downsizing, and degazettement' (PADDD), it is concluded that this country's protected areas, in the absence of the Courts, are vulnerable to prejudicial, politically based decision-making in favour of short-term parochial gains. It is further concluded that this potential outcome arose out of disregarding the public trust duties the MEC is obligated to apply.

Finally, it is recommended that the legislation providing for protected areas be amended to restrict the scope of discretionary clauses providing PADDD. Here the scope should be limited to the rare circumstance where the protected area cannot reasonably be avoided, and the development is unquestionably in the public's long-term best interest, and where the residual loss to biodiversity and the protected area estate is appropriately compensated or offset.

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Disclaimer

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Competing interests

None.

Authors' contributions

AB conceptualised, researched and wrote this article.

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