AN ANALYSIS OF THE INTERPLAY BETWEEN THE TWIN PROVISIONS OF SECTION 48 OF THE NATIONAL ENVIRONMENTAL MANAGEMENT: PROTECTED AREAS ACT AND SECTION 48 OF THE MINERAL AND PETROLEUM RESOURCES DEVELOPMENT ACT, IN RESPECT OF “PROTECTED AREAS”

1 Introduction

This note examines the interplay between the twin provisions of section 48 of the National Environmental Management: Protected Areas Act (57 of 2003) (NEMPA Act) and section 48 of the Mineral and Petroleum Resources Development Act (28 of 2002) (MPRDA), in respect of the concept of a “protected area”. In essence, section 48(1) of the NEMPA Act read with section 48(1) of the MPRDA, prohibit “prospecting” in “protected areas”. However, section 48(1)(b) of the NEMPA Act and section 48(2) of the MPRDA, permit “prospecting” in “protected environments” and in any land “reserved in terms of any other any law”, if written authorisation is acquired under specific strict conditions. “Prospecting” is defined as intentionally searching for any mineral through any method which disturbs the surface or subsurface of the earth, including any portion of the earth that is under the sea or under other water; or in or on any residue stockpile or residue deposit, in order to establish the existence of any mineral and to determine the extent and economic value thereof; or in the sea or other water on land (s 1 read with s 17 of the MPRDA). This issue of the relationship between section 48 of the NEMPA Act and section 48 of the MPRDA has yet to be appropriately adjudicated on by the courts and thus, this paper will assess the implications of their inevitable interaction and suggest an approach that the courts could take in the assessment of a prospecting licence granted in respect of a “protected area”.

2 What is a “protected area”?

The first leg of the discussion is to establish what constitutes a “protected area”. The NEMPA Act recognises various kinds of “protected areas” in South Africa including, *inter alia*: special nature reserves, nature reserves, protected environments, world heritage sites, specially protected forest areas and forest nature reserves (s 9 of the NEMPA Act). In this regard, the Minister or the MEC may by notice in the Gazette, either declare any area specified in the notice as a protected environment; or as part of an existing protected environment; and assign a name to the protected environment (s 28(1)(a)–(b) of the NEMPA Act). Furthermore, according to section 12 of the

NEMPA Act a protected area, which immediately before this section took effect, was reserved or protected in terms of provincial legislation for any purpose for which an area could in terms of this Act be declared as a nature reserve or protected environment, must be regarded to be a nature reserve or protected environment for the purpose of this Act. The question of what constitutes a "protected area" has only been adjudicated by the courts at the High Court, in *Barberton Mines (Pty) Ltd v Mpumalanga Tourism and Parks Agency* ((43125/13) [2016] ZAGPPHC 254), hereinafter "HC *Barberton"*) and in the Supreme Court of Appeal, in *Mpumalanga Tourism and Parks Agency v Barberton Mines (Pty) Ltd* ((216/2016) [2017] ZASCA 9), hereinafter "SCA *Barberton"*).

2 1 The High Court decision in Barberton

At the High Court, the gravamen of the dispute in Barberton was whether the Barberton Nature Reserve constitutes a "nature reserve" for the purposes of the NEMPA Act (HC *Barberton supra* par 34.1). Secondly, whether the properties comprising the alleged Barberton Nature Reserve constitute land being used for public or government purposes or reserved in terms of any other law as contemplated in Section 101 of the Mineral and Petroleum Resources Development Act (HC *Barberton supra* par 34.2). At this juncture, it is imperative to highlight that section 101 of the MPRDA only regulates the appointment of a contractor. The correct provision that regulates the issue of "land being used for public or government purposes or reserved in terms of any other law" is section 48(1)(c) of the MPRDA. Nevertheless, the HC held that on the basis of sections 1, 23 and 28 of the NEMPA Act; for the Barberton Nature Reserve to qualify either as a nature reserve or a protected environment under the NEMPA Act, it must have been declared or regarded as having been declared as a nature reserve or a protected environment in terms of the NEMPA Act or it must have been declared or designated in terms of provincial legislation as a nature reserve or a protected environment in terms of the NEMPA Act (HC *Barberton supra* par 40; s 23 and s 28 of NEMPA Act regulate the declaration by the relevant Minister or MEC in the Gazette, of "nature reserves" and "protected areas" respectively).

The applicant argued that the Barberton Nature Reserve was not declared as a nature reserve or a protected environment in terms of the NEMPA Act (HC *Barberton supra* par 41). In this regard, the HC held that it cannot be said that the Proclamation No. 12, 1996 of Provincial Gazette 132 of 29 March 1998 (the Proclamation) was "*accessible to the public"* and for that reason, it is void for vagueness even though the applicant did not seek to challenge its constitutional validity (HC *Barberton supra* par 54). The respondents conceded that the Proclamation does not identify the area of "Barberton Nature Reserve" as a conservation area (HC *Barberton supra* par 49). The respondents further conceded that the boundaries of the land comprising the reserve were not described in the Proclamation but argued that it is clear in a purposive and contextual reading of the Proclamation, that the boundaries of the reserve remained identical to those described in the Resolution 137 of the Executive Committee of the Transvaal Provincial Administration of 17 January 1985 (the 1985 Resolution) and thus include the properties in issue and that the status of the land was not changed (HC

Barberton par 50). The court dismissed this averment on the basis that this submission was made despite the fact that the Proclamation the respondents were relying on or made no reference to the resolution at all (HC *Barberton* par 51). Even if it had, it would still have been impossible to determine the boundary of the Barberton Nature Reserve (HC *Barberton* par 51). According to the court's reasoning, this is because the resolution was never published in the Provincial Gazette or made known by notice to the public in any manner and secondly, because the resolution never defined the area as the "Barberton Nature Reserve" (HC *Barberton supra* par 51). It was then held that in the Proclamation, there is a reference to the area identified in the resolution which is entirely speculative and is not supported by any evidence (HC *Barberton supra* par 51).The consequence of the failure of the Proclamation to identify the area comprising the alleged "Barberton Nature Reserve" was that the said Proclamation would not divulge any information on the location or extent of the alleged reserve or to act in accordance with the Proclamation (HC *Barberton supra* par 52). The HC held that this contravenes section 101(3) of the Constitution, which requires that Proclamations must be accessible to the public (HC *Barberton* par 52). Consequently, since the Proclamation did not comply with the requirements set out in Section 101 of the Constitution, it can therefore not be validly used to bar the applicant from exercising a legitimately acquired right to prospect (HC *Barberton supra* par 54). As a result, it was then held that the Proclamation did not constitute a declaration or designation in terms of provincial legislation of the area including the prospecting area for a purpose for which it could have been declared as a nature reserve in terms of the NEMPA Act (HC *Barberton supra* par 55). On this score, the two proclamations (Proclamation No. 12, 1996 of Provincial Gazette 132 of 29 March 1998 (the 1996 Proclamation); General Notice 185 of 2014 in Provincial Gazette 2302 of 22 May 2014 (the 2014 Proclamation) and the 1985 Resolution, on which the respondents relied for the submission that the prospecting area falls within a nature reserve as prescribed under section 23 of NEMPA Act, did not appear to sustain their submission (HC *Barberton supra* par 66). Thus, the court held that the purposive interpretation which the respondents implored the court to follow would bring forth results which were not contemplated by the relevant legislature authorities (HC *Barberton supra* par 66).

2 2 The SCA decision

On appeal of the High Court decision, the SCA brought more clarity by holding that a "protected area" by definition, encompassed a "protected environment", which, in turn, includes an area declared or designated in terms of provincial legislation (SCA *Barberton supra* par 12). This is because section 9 of the NEMPA Act lists "protected environments" as a type of a "protected area" (s 9(a) of NEMPA Act; see SCA *Barberton supra* par 12). The NEMPA Act defines a "protected environment" as an area declared, or regarded as having been declared, in terms of section 28 as a protected environment; or an area which before or after the commencement of the NEMPA Act was or is declared or designated in terms of provincial legislation for a purpose for which that area could in terms of section 28(2) be declared as a protected environment, and includes an area declared in

terms of section 28(1) as part of an area referred to in paragraph (a) or (b) above (s 1 of NEMPA Act). The SCA held that section 12 of NEMPA Act, as the deeming provision, serves to broaden the scope of NEMPA Act to include within its reach, a protected area reserved or protected by provincial legislation (SCA *Barberton supra* par 13). It was then held that the effect of this provision is thus to extend the protection afforded to a nature reserve by NEMPA Act, to a protected area reserved in terms of provincial legislation as well (SCA *Barberton supra* par 13). Consequently, the SCA held that the HC was wrong in holding that Barberton is not a "protected area" because the prospecting area falls on land that the provincial government has been actively trying to conserve for more than thirty years (SCA *Barberton supra* par 7). The HC had taken the view that because the description of the area therein is vague, it must be regarded as void (SCA *Barberton supra* par 15). However, the SCA held that it is the duty of the Court to avoid, if possible, the conclusion that the Notice in question was too vague to be effective (SCA *Barberton supra* par 15). Since the Proclamation in question, met the requirements of section 12 of the NEMPA Act, the SCA held that the prospecting area fell to be protected against prospecting under s 48(1) of that NEMPA Act (SCA *Barberton supra* par 20).

3 A critical assessment of the interplay between the twin provisions of section 48 of NEMPA Act and section 48 of the MPRDA

Having established the parameters of a "protected area", the next leg of the discussion is to juxtapose the twin sections to assess their compatibility. It is clear that the decision to grant a mining right over a "protected area" requires prudence and due consideration (see *Escarpment Environmental Protection Group and Birdlife South Africa v Minister of Mineral Resources, Department of Mineral Resources and William Patrick Bower (Pty) Ltd* Case Number 99593/15 (18 April 2017)). The courts in South Africa are yet to sufficiently adjudicate on the relationship between section 48 of NEMPA Act and section 48 of the MPRDA. The *Barberton* cases are the only instance when the courts have come close to investigating the relationship between these two provisions, both in the High Court (HC) and the Supreme Court of Appeal (SCA), but no finding was made in this regard.

At the HC, in *Barberton*, the review application rested on the twin provisions, *inter alia*: first, that the grant of the prospecting right was prohibited under section 48(1)(a) or (b) of NEMPA Act (HC *Barberton supra* par 68.2) and second, the grant of the prospecting right was prohibited under section 48(1)(c) of the MPRDA (HC *Barberton supra* par 68.3). In essence, the respondents alleged that the prospecting area falls within an area described as the "Barberton Nature Reserve" which constitutes a "nature reserve" or "protected area" as contemplated by section 48(1)(a) or (b) of the NEMPA Act in which commercial prospecting is prohibited (HC *Barberton supra* par 86). The respondents further contended that the properties in respect of which the prospecting right was granted, comprise of land being used for public or government purposes or reserved in terms of any other law as contemplated in the MPRDA in respect of which, subject to section 48(2) no prospecting right may be granted (HC *Barberton supra* par 87). The

respondents submitted that this means not only that the prospecting right should not have been granted but also that no prospecting activities should be undertaken within the alleged reserve regardless of whether a prospecting right has been granted in respect of that area (HC *Barberton supra* par 88). Unfortunately, the review application was out of time and as a result, condonation could not be granted (HC *Barberton supra* par 93). The SCA merely held that section 48(1)(c) of the MPRDA, must be read subject to section 48 of the NEMPA Act, which prohibits the granting of a prospecting right in respect of any land being used for public or government purposes or reserved in terms of any other law (SCA *Barberton supra* par 11). Thus, the SCA established that section 48(1) of the NEMPA Act must always be read with section 48(1) of the MPRDA. This finding of the SCA implies that in order for one to claim the right to prohibit prospecting in a "protected area", one must either prove that the place in question is one that is a "protected area" in terms of section 9 read with section 12 of the NEMPA Act or is "reserved in terms of any other law" such as the NEMPA Act, in terms of section 48(1)(c) of the MPRDA. However, the SCA did not explore section 48(2) of the MPRDA nor section 48(1)(b) of the NEMPA Act and their relevance to the prohibition on prospecting in protected areas. It is submitted that the SCA in *Barberton* should have brought the much-needed clarity on the relationship between section 48 and section 48.

Section 48(2) of the MPRDA offers an exception to the prohibition on prospecting in "protected areas" because it provides that, *inter alia*, in respect of any land being used for public or government purposes or reserved in terms of any other law; or areas identified by the Minister by notice in the Gazette in terms of section 49 (s 48(1)(c)–(d) of MPRDA), that a prospecting right may be granted if the Minister of Mineral Resources is satisfied that: firstly, having regard to the sustainable development of the mineral resources involved and the national interest, it is desirable to issue it; secondly, the reconnaissance, prospecting or mining will take place within the framework of national environmental management policies, norms and standards; and lastly, the granting of such rights or permits will not detrimentally affect the interests of any holder of a prospecting right or mining right (s 48(2) of MPRDA).These requirements are cumulative. Thus section 48(2) of the MPRDA, builds on the exception to the prohibition on prospecting in "protected environments" provided for in section 48(1)(b) of the NEMPA Act. This means that in respect of the prohibition on prospecting in "protected areas", section 48(2) of the MPRDA must always be read with section 48(1)(b) of the NEMPA Act. In fact, a close reading of section 48(1)(b) makes it clear that prospecting in a "protected environment" is permitted only after the written of the Minister of Environmental Affairs and the Minister of Mineral Resources are secured. In the alternative, Kidd opines that section 48(2) of the NEMPA Act, in a somewhat perplexing manner, seemingly allows prospecting in protected areas (Kidd *Environmental Law* 2ed (2011) 119). It is submitted that section 48(2) of the NEMPA must be read with section 48(3) of the NEMPA Act. These two provisions read together, provide that the NEMPA Act does not permit new mining operations *per se*, it merely legalises, after a review, the mining activities that were lawfully conducted in a "protected area", "immediately before the commencement of this section of the NEMPA Act, subject to the prescribed conditions under which those activities may continue in order to

reduce or eliminate the impact of those activities on the environment or for the environmental protection of the area concerned" (see s 48(3) of the NEMPA Act).

The difference between section 48(2) of the MPRDA and section 48(1)(b) of the NEMPA Act, is that in the MPRDA, the written authorisation of the Minister of Environmental Affairs is dispensed with. The removal of the consent of the Minister of Environmental Affairs in the MPRDA would seem to indicate that the MPRDA purports to circumvent the role of the Department of Environmental Affairs (DEA) in assessing the negative impact of the prospecting on "protected areas" as well as the concomitant environmental impact assessment requirements (see further GN R982 in *GG* 38282 of 2014-12-04: National Environmental Management Act (107/1998): Environmental Impact Assessment Regulations, 2014).

However, section 48(2) of the MPRDA is more instructive than its twin provision in section 48(1)(b) in that it provides the conditions which must be complied with before the Minister(s) give their consent to prospecting in an area "reserved in terms of any other law", such as, a "protected area". Since, there appears to be a conflict between section 48(1)(b) of NEMPA Act and its twin provision, section 48 (2) of the MPRDA, on the role of the Minister of Environmental Affairs, section 7 of the NEMPA Act comes into play. Section 7 of the NEMPA Act provides that in the event of any conflict between a section of this Act and other national legislation, the section of this Act prevails if the conflict specifically concerns the management or development of protected areas (s 7(1)(a) of NEMPA Act). The SCA has held that the NEMPA Act binds all organs of state (s 4(2) of NEMPA Act) and supersedes other legislation in the event of a conflict concerning the management or development of protected areas (SCA *Barberton supra* par 12). This means that the NEMPA Act is the primary legislation in respect of "protected areas" especially when a conflict with other national legislation exists. It is submitted that since the NEMPA Act is the primary legislation in respect of the management of protected areas, it follows then that section 48(2) of the MPRDA must be read to say that the written authorisation of both the Minister of Environmental Affairs and the Minister of Mineral Resources, is required before a prospecting licence is granted by the relevant authority in respect of a "protected area". This interpretation is the one that is followed by the Department of Mineral Resources and the Department of Environmental Affairs in granting a prospecting licence over a protected area (see Department of Environmental Affairs Media Release "Environmental Affairs clarifies matters around permission granted to Atha-Africa Ventures to mine within the Mabola protected environment in Mpumalanga province" https://www.environment.gov.za/mediarelease/athaafrica_ventures_mining_ mabolampumalanga (accessed 2017-05-19)).

It bears mention that section 48(1) of the NEMPA Act is clumsily drafted and raises some fundamental questions. In essence, section 48(1) of the NEMPA Act provides that no prospecting may be conducted in a "protected environment" without the written authorisation of the Minister of Environmental Affairs and the Minister of Mineral Resources. However, it appears that no prospecting is allowed in a "special nature reserve" or "nature reserves" (s 48(1)(a) of the NEMPA Act); "world heritage sites" and "specially protected forest areas", "forest nature reserves" and "forest

wilderness areas" declared in terms of the National Forests Act 84 of 1998 (s 48(1)(c) of the NEMPA Act ; see also s 9(b) and s 9(d) of NEMPA Act; see further s 8(1) of National Forests Act). This implies that one can never acquire authorisation from the government authorities to prospect in nature reserves; special nature reserves; world heritage sites; specially protected forest areas; forest nature reserves and forest wilderness areas declared in terms of the National Forests Act (NFA). This finding is supported by the Mining Biodiversity Guidelines which provide that mining is prohibited in all protected areas except protected environments if both the Minister of Environmental Affairs and the Mineral Resources approve it (Mining Biodiversity Guidelines 2013 https://www. environment.gov.za/sites/-default/files/legislations/miningbiodiversity_guidelines2013.pdf 29 32 (accessed 2017-04-19)). However, in respect of "world heritage sites", it is clear that the World Heritage Convention Act 49 of 1999 (WHCA) provides that prospecting is permitted in world heritage sites in exceptional circumstances, within the framework of the principle of sustainable development that ensures that prospecting can occur only if it "cannot be avoided" and the associated effects are "mitigated" and ultimately, that the development, use and exploitation of renewable resources and the ecosystems of which they are part do not exceed the level beyond which their integrity is jeopardised (s 4 of the WHCA read with Regulation 39(1)(a)(i) of the Regulations for the Proper Administration of Special Nature Reserves, National Parks and World Heritage Sites: GN R1061 in *GG* 28181 of 2015-10-28). In the same vein, the NFA provides that nothing prohibits the grant in terms of any law of a right to prospect for, mine or dispose of any mineral as defined in the Minerals Act (50 of 1991), or any source material as defined in the Nuclear Energy Act (131 of 1993), in a state forest but the holder of such a right may not do anything which requires a licence in terms of section 23 without such a licence and the grant of any such right after the commencement of the National Forest and Fire Laws Amendment Act, 2001, must be made subject to the principles set out in section 3(3) of this Act (s 24(9) of NFA). On the back of section 7 of the NEMPA Act, which provides that the NEMPA Act overrides other legislation in respect of "protected areas", this implies that prospecting is permitted only in "protected environments" envisaged in section 48(1)(b) and that despite the provisions in the NFA and WHCA, prospecting is not permitted in special nature reserves or nature reserves; world heritage sites; specially protected forest areas; forest nature reserves and forest wilderness areas envisaged in section 48(1)(c) of the NEMPA Act. This notion is entrenched by the Mining Biodiversity Guideline which provides that these areas are regarded as Category A Biodiversity areas in which the regulatory authorities should use the law to prohibit mining in them (Mining Biodiversity Guidelines 2013 https://www.environment.gov.za/sites/default/files/legislations/miningbiodiversity_guidelines2013.pdf 28 (accessed 2017-04-19)).

On the contrary, it is suggested that since the SCA has found that a "protected area" by definition, encompasses a "protected environment", which, in turn, includes an area declared or designated in terms of provincial legislation (SCA *Barberton supra* par 12), that this means that the courts do not distinguish between a "protected environment" and a "protected area" and it is immaterial whether that "designation" is made at provincial or national level. The SCA in *Barberton* held that this interpretation is borne out

of section 9 read with section 12 of the NEMPA, which recognise a "protected environment" as a kind of a "protected area" (see also s 28 of NEMPA Act; SCA *Barberton supra* par 12). It follows then that the NEMPA Act does not distinguish between the different kinds of "protected areas" provided by section 9 of the NEMPA Act and the broad class of "protected areas" contemplated in section 48(1)(c) of the MPRDA (the areas "reserved in terms of any other law"). This means then that section 48(1) of the NEMPA Act must be read as encompassing that the prior written authorisation of both the Ministers of Environmental Affairs and the Minister of Mineral Resources must be acquired to prospect in *all* the "protected areas" envisaged in section 9 of the NEMPA Act, including the consent of the Minister of Agriculture, Forestry and Fisheries in respect of "protected areas" relating to forests. This broad approach is informed by the broad definition of "protected areas" employed by the SCA in *Barberton*. Furthermore, section 48(1)(c) of the MPRDA propagates the broad approach to the interpretation of "protected areas" because it provides that the written authorisation of the Minister(s) is required in respect of areas which are "reserved in terms of any other law". This means that the courts will employ a flexible test in order to assess whether the place in question is a "protected area" in that the court will look at if the place is either a "protected area" as per section 9 of NEMPA Act or "reserved in terms of any other law" as per section 48(1)(c) of the MPRDA (see NFA and WHCA alluded to earlier).

However, the problem with section 48(2)(a) of the MPRDA is that the "sustainable development" it seeks to achieve appears to be only geared towards preservation of the "mineral resources involved"; the "national interest" and the "interests of any holder of a prospecting right or mining right", instead of balancing those interests with the preservation of the integrity of the "protected area" within which the minerals are found. The "national interest" is not defined and thus could be used to malign the protection of the environmental integrity of "protected areas". It would appear that under section 48(2), the preferent prospecting rights of local communities are trumped by the rights of any holder of a prospecting right because section 48 does not mention the interest of local communities in this regard (see s 104(4) of the MPRDA).While in principle, this approach would be in line with section 104 of the MPRDA, the Promotion of Administration Justice Act 3 of 2000 (PAJA), requires that before the granting of a prospecting licence, the community concerned should be informed by the Department of Mineral Resources of the application and its consequences and it should be given an opportunity to make representations in this regard (*Bengwenyama Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd* 2011 (3) BCLR 229 (CC) par 73; see further "DMR Guideline for Consulting with Communities and Interested and Affected Parties" http://cer.org.za/wp-content/uploads/2013/03/DMR-consultation-guidelines.pdf (accessed 2017-04-08); see also s 3–s 7 of PAJA).

In tandem with this, it must be borne in mind that one of the key principles of NEMA requires people and their needs to be placed at the forefront of environmental management−*batho pele* (*Fuel Retailers Association of Southern Africa v Director-General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province* 2007 (10) BCLR 1059 (CC) par 60 (hereinafter "*Fuel Retailers"*)). This implies that sustainable development in South Africa is premised on the

anthropocentric approach which means that it places the needs of humans above those of other considerations (see Glazewski *Environmental Law in South Africa* 2ed (2005) 7). This poses the question as to which pillar between the environment, people and development must take precedence in the concept of sustainable development in the South African law. Kidd submits that the three pillars of economic, social, and environmental law must be pursued simultaneously and with equal effect (Kidd *Environmental Law* 18). It is argued in this paper that in South Africa, with the high Gini coefficient and extreme poverty, an anthropogenic oriented model of sustainable development is imperative (see Stats SA "Poverty Trends in South Africa" http://www.statssa.gov.za/?p=2591 (accessed 2017-02-25). An anthropo-centric approach holds that humans are considered to be the central component of the planet (Glazewski *Environmental Law in South Africa* 7). This does not mean that the environment must be eviscerated or its integrity compromised.

It has been opined that at the heart of every sincere argument for ecocentrism is a fear that any anthropocentric approach will necessarily yield less protection for the environment (Tladi "Of Course for Humans: A Contextual Defence of Intergenerational Equity" 2002 9 *SAJELP* 177 183). Ecocentrism is an approach that denotes that the environment must be protected for its own sake and not solely for the interest of man (Tladi 2002 9 *SAJELP* 182). The assumption here is that intergenerational equity as an anthropocentric approach to environmental protection invariably propagates the destruction of any species that is not of value to human beings (Tladi 2002 9 *SAJELP* 183). In the context of protected areas, this assumption often translates into the exclusion or displacement of local communities from protected areas based on the premise that their exclusion leads to the protection of resources situated within these areas (Patterson "Wandering about South Africa's New Protected Areas Regime" 2007 22 *SAPR/L* 1 5). In South Africa, this notion evokes eerie undertones of racism and excludes the primary custodians of these natural habitats. Thus, Tladi cautions that one must guard against the essence of the ecocentric objection to an anthropocentric idea of intergenerational equity, that is, the assumption that such an approach will countenance the destruction of those aspects of natural resources that humans may find to be of no value (Tladi "Strong Sustainable Development, Weak Sustainable Development and the Earth Charter: Towards a more Nuanced Framework of Analysis" 2004 11 *SAJELP* 17 23).

However, there is growing acceptance of the view that effective conservation must be socially and economically relevant and requires the acceptance, active participation, involvement, and co-operation of local communities (Patterson 2007 22 *SAPR/L* 6). The fundamental role of local communities is now acknowledged in the Norms and Standards for the Management of Protected Areas in South Africa which provide that there must be regular interaction, collaboration and a co-management agreement between the protected area management authority and the local communities and that the neighbouring communities must have the opportunity to provide input, where relevant, to decisions relating to protected area management (Norm 10 in GN 382 in *GG* 39878 of 2016-03-31). In the context of protected areas, this participation should extend sharing in the economic benefits derived from their establishment (Patterson

2007 22 *SAPR/L* 6). It is accepted in this paper that an ecological model, which relegates human needs to second place, is also bound to fail because no nation will be willing to save environmental resources for the future if they cannot meet their basic needs today (Tladi 2004 11 *SAJELP* 25). Thus, it is clear that local and neighbouring communities must be consulted and involved in the decision making and proper management of protected areas.

On the whole, it can be argued that the overwhelming focus of section 48(2) of the MPRDA is on securing the exploitation of mineral resources and the rights of mining companies. This implies that section 48(2) propagates a "development first" model of sustainable development in contravention of the principle of "sustainable development" as is postulated in section 24 of the Constitution (see also s 2(3) read with s 2(4) of the National Environment Management Act 107 of 1998 (NEMA)). In South African law, "sustainable development" denotes the integration of social, economic, and environmental factors into planning, implementation, and decision making so as to ensure that development serves present and future generation (s 1 of NEMA). This broad definition of sustainable development incorporates two of the internationally recognised elements of the concept of sustainable development, namely, the principle of integration of environmental protection and socio-economic development, and the principle of intergenerational and intra-generational equity (*Fuel Retailers supra* par 59). Sustainable development is the contemporary norm, which underpins environmental law in South Africa (Glazewski *Environmental Law in South Africa* 12). Economic and social development are considered to be fundamental to the well-being of human beings (*Fuel Retailers supra* par 44). However, development cannot persist in the face of a deteriorating environmental base (*Fuel Retailers supra* par 44). In this way, unlimited development is seen as detrimental to the environment and the destruction of the environment is considered to be detrimental to development (*Fuel Retailers supra* par 44). Therefore, environmental protection requires that development must take heed of the costs of environmental destruction (*Fuel Retailers supra* par 44). The environment and development are thus inexorably intertwined (*Fuel Retailers supra* par 44). In this way, the *Fuel Retailers* case implies that there must be an even balance between the protection of the environment and development in order to comply with section 24 of the Constitution and section 2 of NEMA. This is the integration principle, which Tladi argues, is at the core of the principle of sustainable development (Tladi 2004 11 *SAJELP* 19). In this regard, section 48(2) of the MPRDA attempts, unsuccessfully, to ensure a balance between environmental protection and development.

The Constitution of the Republic of South Africa (the Constitution) envisages that environmental considerations will be balanced with socio-economic considerations through the ideal of sustainable development (*Fuel Retailers supra* par 45). Sustainable development ensures that the benefits of any development outweigh its costs, including environmental costs (McEldowney and McEldowney *Environmental Law* (2010) 12). This is apparent from section 24(b)(iii) of the Constitution, which provides that the environment will be protected by securing "ecologically sustainable development and use of natural resources while promoting justifiable economic and social development" (*Fuel Retailers supra* par 45). Murombo has cautioned that the approach to "sustainable development" in South Africa requires prudence on the part of the courts lest the development-

minded masquerade as environmentalists while protecting only unsustainable commercial interests (Murombo "From Crude Environmentalism to Sustainable Development: Fuel Retailers" 2008 125(3) *SALJ* 488 489). This propensity may give credence to those who argue that the notion of sustainable development is not compatible with a capitalist mode of production and consumption (Murombo 2008 125(3) *SALJ* 489). This apprehension is also shared by Ferris, who opines that decisions driven by socio-economic considerations can be disguised as decisions prompted by environmental concerns (Ferris "Sustainable Development in Practice: *Fuel Retailers of Southern Africa v Director-General Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province*" 2008 1 *Constitutional Court Review* 235 250). In the same breath, Tladi criticises the approach of the court in *Fuel Retailers* in that he asserts that the court conflated social and economic considerations in a way that obfuscates environmental concerns, thereby preserving the status quo and facilitating the instrumentalisation of sustainable development for economic ends (Tladi "Fuel Retailers, Sustainable Development and Integration: A Response to Ferris" 2008 1 *Constitutional Court Review* 255 258). Section 48(2) of the MPRDA certainly appears to fit that mould of being a "development first" model of sustainable development disguised as a guardian of the environment.

It can then be seen that the interplay between the twin provisions reflects an uneven balance between development and protection of the environment. It is submitted that this uneven balance highlights the lack of coordination between the Department of Mineral Resources and the Department of Environmental Affairs. This is evinced by the disregarding of the consent of the Minister of Environmental Affairs in respect of prospecting in "protected areas" and the complete disregard of the interests of local and neighbouring communities in section 48(2) of the MPRDA. This approach contravenes the NEMA which provides 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 (s 2(4)(b) of NEMA; see Field "Sustainable Development versus Environmentalism: Competing Paradigms for the South African EIA Regime" 2006 123 (3) *SALJ* 409 434). It is required that there must be intergovernmental coordination and harmonisation of policies, legislation and actions relating to the environment (s 2(4)(l) of NEMA). In the same vein, the NEMPA Act explicitly requires that co-operative governance must be observed in the declaration and management of protected areas (s 2(b) of NEMPA Act).

The NEMA also explicitly requires that the development, use and exploitation of renewable resources and the ecosystems of which they are part do not exceed the level beyond which their integrity is jeopardised (s 2(4)(a)(vi) of NEMA). It is difficult to envisage a situation whereby prospecting in "protected areas" will take place within the framework of national environmental management policies, norms and standards as postulated in section 48(2)(b) of the MPRDA. This is because the preservation of the integrity of a "protected area" is irreconcilable with prospecting as envisaged in section 48(1) and section 48(2).The Department of Mineral Resources concedes as much in the Mining Biodiversity

Guidelines in that it provides that protected areas are high diversity priority areas that are important for conserving biodiversity that supports the provision of ecosystem services vital to people and economic activities downstream of ecosystem service flows whose loss would be difficult or in some cases impossible to compensate or offset; there are no cost effective substitutes for many of the services they deliver. (Mining Biodiversity Guidelines 2013 https://www.environment.gov.za/sites/default/files/legislations/miningbiodiversity_guidelines2013.pdf 25 (accessed 2017-04-19).The overall weight of the requirements of section 48(2) is on preserving the interests of mining and development (see s 48(2)(a) and s 48(2)(c) of the MPRDA respectively).

The issue of protecting the environmental integrity of a "protected area" was raised in HC *Barberton*, where the court held that there was potential for subterranean invasion of the respondents' land but certainly not at the level initially envisaged by the respondents when they opposed the original application (HC *Barberton supra* par 94). This finding is problematic because it is not clear if the "subterranean invasion" would compromise the environmental integrity of the "protected area" or whether the invasion is inconsequential. However, the reasoning of the HC in this regard strikes at the heart of sustainable development and the risk averse and cautious approach that is propagated by NEMA (see s 2(4)(a)(vii) of NEMA). This is because the HC held that if the subterranean invasion is significant, the respondents can utilise the existing mechanisms for compensation (HC *Barberton supra* par 94). This finding is also disconcerting in that it flagrantly contravenes the reasoning of the court in *Fuel Retailers* which held that the precautionary approach is especially important in the light of section 24(7)(b) of NEMA which requires the cumulative impact of a development on the environmental and socio-economic conditions to be investigated and addressed (*Fuel Retailers supra* par 81). Furthermore, section 48 (2) of the MPRDA should be read with section 2 of the NEMPA Act, which provides that one of the objectives of NEMPA Act is to promote sustainable utilisation of protected areas for the benefit of people, in a manner that would preserve the ecological character of such areas (s 2(e) of NEMPA Act).

It is also argued in this note that the twin provisions of section 48(1)(b) of the NEMPA Act and section 48(2) of the MPRDA, must be read with section 2 of NEMA. This is because section 48(4) of the NEMPA Act provides that when applying this section, the Minister must take into account the interests of local communities and the environmental principles referred to in section 2 of the NEMA. The NEMA principles "apply to the actions of all organs of state that may significantly affect the environment" (*Fuel Retailers supra* par 67). They provide not only the general framework within which environmental management and implementation decisions must be formulated, but they also provide guidelines that should guide state organs in the exercise of their functions that may affect the environment (*Fuel Retailers supra* par 67; *MEC for Agriculture, Conservation, Environment and Land Affairs v Sasol Oil (Pty) Ltd* [2006] 2 All SA 17 (SCA) par 15; *Minister of Public Works v Kyalami Ridge Environmental Association (Mukhwevho Intervening)* 2001 (7) BCLR 652 (CC) par 69). More importantly, these principles provide guidance for the interpretation and implementation not only of NEMA but any other legislation that is concerned with the protection and management of the environment (*Fuel Retailers supra* par 67; s 2(1)(e) of NEMA). This means that section 2

of NEMA applies to the NEMPA Act. Therefore, it is clear that these principles must be observed as they are crucial to the protection and management of the environment (*Fuel Retailers supra* par 67; Patterson "Fuelling the Sustainable Development Debate in South Africa" 2006 123(1) *SALJ* 53 62). On this score, it can be argued that both the SCA and HC judgments in *Barberton* were decided oblivious of the requirement that section 2 binds the application of section 48 of the NEMPA Act. Moreover, the NEMPA Act makes it clear that it must read within the framework of NEMA in respect of the declaration and management of protected areas (s 2(a) of the NEMPA Act). Therefore, section 48(4) requires that the process of granting a prospecting licence over a "protected area" must be in accordance with the national environmental management principles of section 2 of the NEMA.

4 Concluding remarks

This note has examined the interaction between section 48 of the NEMPA Act and section 48 of the MPRDA. This paper suggests that a court seized with a review of a grant of a prospecting licence in a "protected area", must consider the following elements: first, it must be determined that the area in question is a "protected area" according to section 9 of the NEMPA Act or an area reserved in terms of any other law as contemplated in section 48(1)(c) of the MPRDA; second, the evaluator must check whether the written authorisation of both the Minister of Environmental Affairs and the Minister of Mineral Resources and in certain instances, the Minister of Agriculture, Forestry and Fisheries, was acquired; third, it must be determined that section 2 of the NEMPA Act was complied with which places the interests of the local people at the forefront of environmental management; fourth, the grant of the prospecting licence must comply with the principle of sustainable development as postulated in section 24 of the Constitution and section 2 of NEMA; fifth, prospecting must take place within the framework of national environmental management policies, norms and standards together with the requirements of the NFA and WHCA where relevant; sixth, the granting of such rights or permits will not detrimentally affect the interests of any holder of a prospecting right or mining right; seventh, there must be consultation with local and neighbouring communities and such communities should be given an opportunity to make representations and assist in the management of the protected areas and lastly, it must be shown that the grant of the prospecting licence is in line with the national environmental management principles enunciated in section 2 of NEMA. These considerations may be of assistance in the ongoing litigation over the Mabola area where the South African government has granted a mining licence Atha-Africa Ventures despite the area being classified as a "protected area" (see Phakathi "MPs hit out at mining approval at Mabola sanctuary" 10 May 2017 *Business Day*).

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