

# MINING AND MINERALS ALERT

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### HISTORICALLY PROTECTED AREAS TRUMP MINERAL RIGHTS IN SUPREME COURT OF APPEAL JUDGMENT

A recent judgment in the Supreme Court of Appeal (SCA), *Mpumalanga Tourism and Parks Agency (MTPA) and Mountainlands Owners Association (MOA) / Barberton Mines (Pty) Ltd (Barberton Mine), the Director-General of the Department of Mineral Resources and Others*, provides a caution to mineral right applicants to ensure that properties included in their applications have not been declared a protected area under historical provincial legislation. If so, they would be prohibited from conducting operations on the properties under the National Environment Management: Protected Areas Act, No 57 of 2003 (NEMPAA), despite being granted a mineral right.

# HISTORICALLY PROTECTED AREAS TRUMP MINERAL RIGHTS IN SUPREME COURT OF APPEAL JUDGMENT

*The DMR granted Barberton Mines a prospecting right over a substantial area in the Barberton Mountain Land, which is one of the Mpumalanga Province's most important ecological areas.*

*When Barberton Mine sought to commence prospecting operations, they denied it access to these properties, asserting that the properties constituted part of a nature reserve or protected area.*



A recent judgment in the Supreme Court of Appeal (SCA), *Mpumalanga Tourism and Parks Agency (MTPA) and Mountainlands Owners Association (MOA) / Barberton Mines (Pty) Ltd (Barberton Mine), the Director-General of the Department of Mineral Resources and Others*, provides a caution to mineral right applicants to ensure that properties included in their applications have not been declared a protected area under historical provincial legislation. If so, they would be prohibited from conducting operations on the properties under the National Environment Management: Protected Areas Act, No 57 of 2003 (NEMPAA), despite being granted a mineral right.

This is particularly given the SCA's recent wide interpretation as to what constitutes a protected area under historical provincial legislation and NEMPAA.

NEMPAA provides that, despite other legislation, no person may conduct prospecting or mining activities in special nature reserves or protected areas without the prior consent of the Ministers of Mineral Resources and Environmental Affairs. This prohibition extends to a protected area that was immediately before NEMPAA's enactment, reserved or protected in terms of provincial legislation for any purpose for which an area could in terms of NEMPAA be declared as a nature reserve or protected environment. NEMPAA binds all state organs and trumps other legislation, including the Minerals and Petroleum Resources Development Act, No 28 of 2002 (MPRDA), in the event of a conflict concerning the development of protected areas.

In 2006, the DMR granted Barberton Mines a prospecting right over a substantial area in the Barberton Mountain Land, which is one of the Mpumalanga Province's most important ecological areas. It has been placed on the National List of Terrestrial

Ecosystems that are threatened and in need of protection under the National Environmental Management Biodiversity Act, No 10 of 2004 and also on South Africa's Tentative List of World Heritage Sites, with UNESCO's approval.

MTPA and MOA own properties included under Barberton Mines' prospecting right. When Barberton Mine sought to commence prospecting operations, they denied it access to these properties, asserting that the properties constituted part of a nature reserve or protected area. Barberton Mines, therefore, instituted an application in the North Gauteng High Court Pretoria (High Court), seeking inter alia to interdict MTPA and MOA to allow it access to the properties.

In the High Court, MTPA and MOA alleged that the Barberton Nature Reserve was a nature reserve or protected environment under NEMPAA, as it was declared or designated as such in terms of various provincial legislation listed below. Therefore, despite being granted a prospecting right, Barberton Mines was prohibited under NEMPAA from conducting prospecting activities on the properties.

# HISTORICALLY PROTECTED AREAS TRUMP MINERAL RIGHTS IN SUPREME COURT OF APPEAL JUDGMENT

CONTINUED

*The High Court adopted a narrow approach, finding that the Barberton Nature Reserve was not a protected area under NEMPAA and granted the interdict application.*



- The Barberton Mountain Land was first reserved for nature conservation purposes in 1985 under the Transvaal Nature Conservation Ordinance 12 of 1993 (Ordinance), with a map of the area being attached to the Executive Committee of the Transvaal Provincial Administration's resolution (1985 Resolution).
- In 1996, a Member of the Executive Council for Environmental Affairs Mpumalanga, issued a proclamation under the Eastern Transvaal Park Boards Act, No 6 of 1995 (ETPB Act), designating the Barberton Nature Reserve as a "conservation area" (1996 Proclamation).
- In 2014, the Member of the Executive Council for Economic Development, Environment and Tourism amended the definition of "geographical areas" comprising provincial nature reserves in schedules to a proclamation under the Mpumalanga Nature Conservation Act, No 10 of 1998 (2014 Proclamation). Schedule 4 of the 2014 Proclamation included the Barberton Nature Reserve, which was designated as protected area.

The High Court adopted a narrow approach, finding that the Barberton Nature Reserve was not a protected area under NEMPAA and granted the interdict application. This was because the:

- (i) 1985 Resolution had neither been issued personally by the Administrator nor published in terms of the Ordinance and accordingly lacked legal efficacy;

- (ii) 1996 Proclamation didn't identify the "specific area" of the Barberton Nature Reserve as a conservation area and was "too vague"; and
- (iii) 2014 Proclamation purported to amend and not establish the Barberton Nature Reserve.

When considering whether the Barberton Nature Reserve was protected under the provincial legislation, the SCA emphasised that the starting point in interpreting the various proclamations and resolutions was the Constitution and s2(h) of the MPRDA's principles of environmental protection. This includes the principle of promoting the nation's ecological and mineral conservation, which requires the development of mineral resources in an orderly and ecologically sustainable manner while promoting justifiable social and economic development.

The SCA differed from the High Court's narrow interpretation of the 1996 Proclamation, noting that it was the courts' duty to avoid, if possible, conclusions that a notice was too vague to be effective. It further contended that the doctrine of vagueness required "reasonable certainty not perfect lucidity". This included recognising government's role in the furtherance (and not prevention) of social and economic objectives. The SCA found that the 1996 Proclamation was a designation of the Barberton Nature Reserve area (already reserved) and therefore its legal validity didn't require a detailed description of the area reserved, as the High Court contended. The SCA noted that the simple indication of the designated area by name (Barberton

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*The judgment reiterates the increasing need for prudence from mining companies prior to applying for mineral rights.*

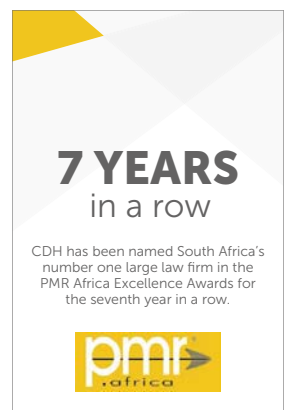
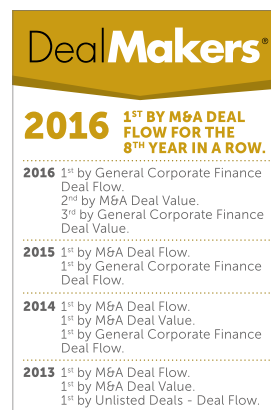
Nature Reserve) was sufficient for the public to comprehend that the named areas were already classified as "conservation areas" under the ETPB Act. It, therefore, held that the 1996 Proclamation indicated the Barberton Nature Reserve with sufficient certainty to meet the High Court's challenge that it was "void for vagueness".

Consequently, on a liberal interpretation of the provincial legislation, the SCA found that the properties were protected area under NEMPAA and Barberton Mines was

prohibited from conducting prospecting activities on them under its prospecting right.

The judgment reiterates the increasing need for prudence from mining companies prior to applying for mineral rights. This includes ensuring that areas under any pending mineral right applications are free from legislative protections beyond the MPRDA and to obtain legal advice if necessary.

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