THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 216/2016

In the matter between:

MPUMALANGA TOURISM & PARKS AGENCY	**FIRST APPELLANT**
MOUNTAINLANDS OWNERS ASSOCIATION	**SECOND APPELLANT**

and

BARBERTON MINES (PTY) LTD	**FIRST RESPONDENT**
THE DEPUTY DIRECTOR GENERAL: DEPARTMENT OF MINERAL RESOURCES	**SECOND RESPONDENT**
THE REGIONAL MANAGER: EMALAHLENI REGIONAL OFFICE DEPARTMENT OF MINERAL RESOURCES	**THIRD RESPONDENT**
THE DIRECTOR GENERAL: DEPARTMENT OF MINERAL RESOURCES	**FOURTH RESPONDENT**
THE MINISTER OF MINERAL RESOURCES	**FIFTH RESPONDENT**

Neutral citation: *Mpumalanga Tourism & Parks Agency v Barberton Mines (Pty) Ltd* (216/2016) [2017] ZASCA 9 (14 March 2017)

Bench: Ponnan, Tshiqi, Majiedt, Dambuza and Van Der Merwe JJA

Heard: 17 February 2016

Delivered: 14 March 2016

Summary: Mining and Environmental Law: grant of a prospecting right in terms of s 17(1) of the Mineral and Petroleum Resources Development Act 28 of 2002 (MPRDA): whether prospecting area part of a protected area as contemplated by s 12 of the National Environmental Management: Protected Areas Act 57 of 2003 (NEMPAA): whether prospecting prohibited by s 48(1) of NEMPAA.

ORDER

On appeal from: Gauteng Local Division, Johannesburg (Baqwa J sitting as court of first instance):

(a) Save for dismissing the appellants' application for leave to adduce further evidence with costs, the appeal is upheld with costs, such costs in each instance to include those consequent upon the employment of two counsel.

(b) The order of the court below is set aside and in its stead is substituted:

'The application is dismissed with costs.'

JUDGMENT

Ponnan JA (Tshiqi, Majiedt, Dambuza and Van Der Merwe JJA):

[1] The Barberton Mountain Land (also described as the Barberton Greenstone Belt or Makhonjwa Mountains) is one of the most ecologically important areas in the Province of Mpumalanga. It is home to some 2200 plant and 300 bird species. The area has been placed on the National List of Terrestrial Ecosystems that are Threatened and in Need of Protection,[1] and has been identified as the most important *refugium* in the province for plant species threatened by climate change. It is also world renowned for its unique geology, consisting, as it does, of rocks estimated to be 3600 million years old, which have been described as the oldest and best preserved sequence of volcanic and sedimentary rocks on Earth. According to geologists, these exposures of Archaean rock provide an unparalleled repository of scientific information about early Earth. At the request of the Minister of Environmental Affairs and Tourism and with the approval of UNESCO the area was placed on South Africa's Tentative List of World Heritage Sites in 2008.[2] All of that notwithstanding, on 6 October 2006 the first respondent, Barberton Mines (Pty) Ltd (Barberton Mines), was granted a prospecting right in terms of s 17(1) of the Mineral and Petroleum Resources Development Act 28 of 2002 (the MPRDA) to conduct prospecting operations for gold and silver on certain properties situated in the District of Barberton (the prospecting area).

[2] On 11 November 2006 the Department of Minerals and Energy (as it then was) approved Barberton Mines' Environmental Management Plan in terms of s 17(5) of the MPRDA and in consequence, the prospecting right for a period of five years came into effect on that date. On 10 August 2011 Barberton Mines lodged an application for the

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[1] See Government Gazette No. 34809 of 9 December 2011, published in terms of the National Environmental Management: Biodiversity Act 10 of 2004.

[2] The designation was made on 6 June 2008 in terms of s 1(xxiv)(a)(ii) of the World Heritage Convention Act 49 of 1999.

renewal of its prospecting right in terms of s 18 of the MPRDA. That application is yet to be granted or refused and, by virtue of s 18(5) of the MPRDA,[3] Barberton Mines' original prospecting right remains in force. When Barberton Mines sought to commence with the prospecting work it encountered resistance from the first appellant, the Mpumalanga Tourism and Parks Association (the MTPA) and several members of the second appellant, the Mountainlands Owners Association (MOA), who asserted that the prospecting area constitutes part of a nature reserve or protected area. On 21 October 2008 the two appellants and three others – the Trustees for the Time Being of the Lomshiyo Trust (the Lomshiyo Trust), Way Prop Two (Pty) Ltd (Way Prop) and Simply See (Pty) Ltd (Simply See) lodged an internal appeal with the Minister of Mineral Resources against the grant of the prospecting right to Barberton Mines. The appeal was dismissed by the Director General: Mineral Resources on 16 April 2012.

[3] On 12 July 2013, and after several meetings and failed attempts at negotiation with the MTPA and MOA, Barberton Mines lodged an application with the North Gauteng High Court, Pretoria.[4] The relief sought, duly amended on 18 August 2015 at the hearing of the matter, was:

'1. It is declared that the applicant is entitled to conduct the prospecting activities referred to in Section 5(3) of the Mineral and Petroleum Resources Development Act 28 of 2002 in accordance with prospecting right MP/30/5/1/2/1040PR in relation to the following properties: Lot 119 Section A Kaap Block, Bickenhall 346JU and Dycedale 368JU, District of Barberton, Mpumalanga Province.

2. The first [MTPA], second [MOA] and fifth [Simply See] respondents are interdicted from denying the applicant access to the prospecting area for the purpose of conducting prospecting activities in accordance with the foresaid prospecting right or interfering with such prospecting activities.'

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[3] Section 18 (5) of the MPRDA provides: 'A prospecting right in respect of which an application for renewal has been lodged shall, despite its stated expiry date, remain in force until such time as such application has been granted or refused.'

[4] The application cited Mpumalanga Tourism and Parks Agency as the first respondent, Mountainlands Owners Association as the second respondent, The trustees for the time being of the Lomshiyo Trust as the third respondent, Way Prop Two (Pty) Ltd as the fourth respondent, Simply See (Pty) Ltd as the fifth respondent, the Deputy Director General: Department of Mineral Resources as the sixth respondent and the Regional Manager of the Emahaleni Regional Office of the Department of Mineral Resources as the seventh respondent.

[4] The MTPA, MOA, Lomshiyo Trust, Way Prop and Simply See, who had been cited as the first to fifth respondents respectively, opposed Barberton Mines' application. In addition, they launched a counter application seeking that:

'1. The Director-General: Department of Mineral Resources is joined as the eighth respondent, and the Minister of Mineral Resources is joined as the ninth respondent, in the main application and the counter-application.

2. The first to fifth respondents' delay in instituting the review of the decision of the sixth respondent and/or seventh respondent to grant the prospecting right MP/20/5/1/1/2/1040PR to the applicant ("the initial decision") and/or the decision of the eighth respondent to uphold the initial decision on appeal ("the appeal decision") is condoned.

3. The initial decision and/or the appeal decision referred to in paragraph 2 are reviewed and set aside.

4. The applicant and the sixth to ninth respondents are jointly and severally liable for the costs of the counter-application, the one paying the others to be absolved.'

[5] In support of the counter application, MTPA's Regional Manager, Mr Louis Loock, alleged:

'5.1 The properties constitute part of a "nature reserve" or "protected environment" as contemplated in section 48(1)(a) or 48(1)(b) of the National Environmental Management: Protected Areas Act 57 of 2003 ("the NEMPA") respectively and in respect of which "no person may conduct commercial prospecting or mining activities". The applicant is accordingly not entitled to conduct prospecting activities in the prospecting area, notwithstanding that it holds a prospecting right to do so. The application should be dismissed on this basis.

5.2 The properties "comprise land being used for public or government purposes or reserved in terms of any other law" as contemplated in section 48(1)(c) of the Mineral and Petroleum Resources Act 28 of 2002 ("the MPRDA") in respect of which "no reconnaissance permission, prospecting right, mining right or mining permit may be issued" save if the conditions stipulated in section 48(2) of the MPRDA have been met. It is common cause that such conditions have not been met. The applicant is accordingly not the holder of any valid prospecting right entitling it to prospect on the properties. The application should be dismissed on this basis.'

[6] The High Court (per Baqwa J) found in favour of Barberton Mines that the prospecting area did not constitute part of a 'nature reserve' or 'protected environment'. In arriving at that conclusion, the court considered and rejected in turn three '*acts*' of

provincial government (in 1985, 1996 and 2014) relied upon in support of the contention that the prospecting area formed part of a nature reserve or protected area as defined in s 1 of the National Environmental Management: Protected Areas Act 57 of 2003 (the NEMPAA). Accordingly, the court found that the prospecting area was not subject to the prohibition against prospecting under s 48(1) of the NEMPAA.[5] It declined to enter into the merits of the counter application because, so it held, the 'application is out of time and condonation cannot be granted'. The High Court accordingly issued an order in these terms:

'95.1 It is declared that the applicant is entitled to conduct the prospecting activities referred to in Section 5 (3) of the Mineral and Petroleum Resources Development Act 28 of 2002 in accordance with prospecting right MP/30/5/1/2/1040PR in relation to the following properties: Lot 119 Section A Kaap Block, Bickenhall 346 JU and Dycedale 368 JU, District Barberton, Mpumalanga Province.

95.2 The first, second and fifth respondents are interdicted and restrained from denying the applicant access to the prospecting area for the purpose of conducting prospecting activities in accordance with the aforesaid prospecting right or interfering with such prospecting activities.

95.3 The applicant is authorised –

95.3.1 to enter the properties mentioned in paragraphs 95.1 hereof together with its employees and to bring onto the land any plant, machinery or equipment, and build, construct or lay down any surface or underground structure which may be required for purposes of prospecting;

95.3.2 to carry out any other activity incidental to its prospecting operations.

95.4 The first, second and fifth respondents are ordered to pay the costs of this application jointly and severally, the one paying the other to be absolved.'

MTPA and MOA (collectively referred to as the appellants) appeal with the leave of that court.

[7] The prospecting area falls on land that the provincial government has been actively trying to conserve for more than thirty years. The land was first identified as worthy of protection in the late 1960s by the then Transvaal Provincial Administration. A

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[5] Section 48(1) provides: 'Despite other legislation, no person may conduct commercial prospecting, mining, exploration, production or related activities –

(a) in a special nature reserve, national park or nature reserve;

(b) in a protected environment without the written permission of the Minister and the Cabinet member responsible for minerals and energy affairs; or

(c) in a protected area referred to in section 9 (*b*), (*c*) or (*d*).'

range of planning initiatives and several scientific surveys were undertaken culminating in a request in 1981 by the then Nature Conservation Division to reserve the land, including the prospecting area, for purposes of nature conservation and outdoor recreation. Consequently, on 17 January 1985, the Executive Committee of the Transvaal Provincial Administration adopted a Resolution (the 1985 Resolution), which reads:

'It is decided that:

(i) The reservation of approximately 20,000 hectares of state land and state mining land in Barberton as in Appendix A of the Memorandum for the purposes of nature conservation and outdoor recreation is approved; . . .'

Appendix A of the Memorandum comprised a map depicting the reserved properties and approximately 7 000 hectares of private properties that were designated to be reserved subsequent to agreement with the respective land owners. Although the 1985 Resolution does not record the law under which the Executive Committee acted, the applicable provincial law then in force was the Transvaal Nature Conservation Ordinance 12 of 1983 (the Ordinance).

[8] In 1994 the Transvaal Provincial Administration (and with it the Nature Conservation Division) was abolished pursuant to the Interim Constitution Act 200 of 1993. The Nature Conservation Division, together with the administrations responsible for conservation management in the former Lebowa, KwaNdebele and KaNgwane were then absorbed into the Eastern Transvaal Parks Board. The Eastern Transvaal Parks Board was established in terms of the Eastern Transvaal Parks Board Act 6 of 1995 (the ETPB Act) 'to provide effective conservation management of the natural resources of the Province, and to promote the sustainable utilisation thereof'.[6] The ETPB Act also provided for the transfer of the administration of certain provincial nature conservation laws, including the Ordinance, to the Eastern Transvaal Parks Board.[7] On 29 March 1996 the responsible member contemplated by the ETPB Act, namely the Member of the Executive Council for Environmental Affairs, Mpumalanga (the MEC) issued

[6] Section 14(1) of the ETPB Act.
[7] Section 20 read with Schedule 5.

Proclamation Number 12 of 1996 (the 1996 Proclamation).[8] The 1996 Proclamation read: '"Conservation Areas" in section 1 of the [ETPB Act], include the following areas from 1 April 1996'. There followed a list of some 31 names including the Barberton Nature Reserve. Section 1 of the ETPB Act defined a '"conservation area" to mean an area designated by the responsible Member in the *Provincial Gazette* to be a conservation area.'

[9] On 22 May 2014, the Member of the Executive Council for Economic Development, Environment and Tourism (the MEC) published a Proclamation to 'amend the definition of the geographical areas comprising the Provincial Nature Reserves, referred to in the Schedules' (the 2014 Proclamation).[9] The 2014 Proclamation was promulgated in terms of s 85(a) of the Mpumalanga Nature Conservation Act 10 of 1998, which provides:

'In addition to any other power conferred upon him or her in terms of this Act or any other law, the Responsible Member may –

(a) by notice in the Provincial Gazette declare any area defined in the notice to be a nature reserve and he or she may at any time by notice amend the definition of such an area or withdraw the declaration of such an area to be a nature reserve: . . .'Schedule 4 of the 2014 Proclamation is headed '*Description of Provincial Nature Reserves – Mpumalanga Province: Barberton Nature Reserve*' and provides: 'The Barberton Nature Reserve situated in the Mpumalanga Province, measuring in extent 27 808.4725 hectares and [is] defined as follows – '. The schedule includes a map of the Barberton Nature Reserve which defines the geographical boundaries of the reserve. The map is accompanied by a list of the properties that are labelled on the map, together with the size of each property (in hectares) and the plot number. All of the properties listed in Barberton Mines' prospecting right are included as properties comprising part of the Barberton Nature Reserve in Schedule 4.[10]

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[8] Proclamation No. 12 of Provincial Gazette Number 132 of 29 March 1996.

[9] Published in General Notice 185 of 2014 in the Provincial Gazette 2302 of 22 May 2014.

[10] Although Covington 245 JU is not listed in Schedule 4 of the 2014 Regulations, it is apparent from the map in Schedule 4 that Covington 245 JU is included in the area marked 54 on the map (designated as Sheba 949JU).

[10] The High Court identified the principal issue in the matter as:

'34.1 whether the alleged Barberton Nature Reserve constitutes a "nature reserve" for the purposes of the National Environmental Management: Protected Areas Act;'

It approached that enquiry thus:

'40. Reading from the above provisions or Sections 1, 23 and 28 respectively; for the Barberton Nature Reserve to qualify either as a nature reserve or a protected environment under the Protected Areas Act, it must have been declared or regarded as having [been] declared as a nature reserve or a protected environment in terms of the 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 Act.'

In arriving at that conclusion the High Court reasoned that: (a) the 1985 Resolution had neither been issued under the hand of the Administrator nor published in terms of s 14 of the Ordinance and that it accordingly lacked legal efficacy;[11] the 1996 Proclamation did not 'identify the area of "*Barberton Nature Reserve"* as a conservation area'; and (c) the 2014 Proclamation purported to amend not establish the Barberton Nature Reserve. I may say at the outset that, in my opinion, the High Court took far too narrow a view of the matter.

[11] A useful starting point is s 24 of the Constitution,[12] which affords everyone the right 'to an environment that is not harmful to their health or well-being'. One of the objects of the MPRDA (s 2(*h*)) is to 'give effect to section 24 of the Constitution by ensuring that the nation's mineral and petroleum resources are developed in an orderly and ecologically sustainable manner while promoting justifiable social and economic development.' The granting of prospecting rights under the MPRDA is thus made subject to environmental protections and constraints.[13] Section 48(1)(*c*) of the

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[11] Section 14 of the Ordinance headed 'Declaration of nature reserves' provides: 'The Administrator may by notice in the *Provincial Gazette* declare an area defined in the notice to be a nature reserve and he may at any time by like notice amend the definition of such an area or withdraw the declaration of such an area to be a nature reserve.'

[12] Everyone has the right— (a) to an environment that is not harmful to their health or well-being; and (b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that— (i) prevent pollution and ecological degradation; (ii) promote conservation; and (iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.

[13] See ss 5A, 17(1)(c), 39(2), 41(1) of the MPRDA. See also *Bengwenyama Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd* 2011 (4) SA 113 (CC) para 34.

MPRDA,[14] which must be read subject to s 48 of the NEMPAA, 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.'

[12] NEMPAA binds all organs of state (s 4(2)) and trumps other legislation in the event of a conflict concerning the management or development of protected areas.[15] According to s 9(a) of NEMPAA, 'the system of protected areas in South Africa' includes 'special nature reserves, national parks, nature reserves (including wilderness areas) and protected environments'. In terms of s 1:

A 'nature reserve' is defined as -

'(a) an area declared, or regarded as having been declared, in terms of section 23 as a nature reserve; or

(b) an area which before or after the commencement of this Act was or is declared or designated in terms of provincial legislation for a purpose for which that area could in terms of section 23(2) be declared as a nature reserve,

and includes an area declared in terms of section 23(1) as part of an area referred to in paragraph (a) or (b) above'.

A 'protected area' is defined as –

'any of the protected areas referred to in section 9;'

and, a 'protected environment' is defined as -

'(a) an area declared, or regarded as having been declared, in terms of section 28 as a protected environment;

(b) an area which before or after the commencement of this 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; or

(c) . . .,

and includes an area declared in terms of section 28(1) as part of an area referred to in paragraph (a), (b) or (c) above.'

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[14] Section 48(1)(c) of the MPRDA provides:
'(1) Subject to section 48 of the National Environmental Management: Protected Areas Act, 2003 (Act No. 57 of 2003), and subsection (2), no reconnaissance permission, prospecting right, mining right may be granted or mining permit be issued in respect of- . . . (c) and land being used for public or government purposes or reserved in terms of any other law'.

[15] Section 7(1)(a) provides: '(1) In the event of any conflict between a section of this Act and (a) other national legislation, the section of this Act prevails if the conflict specifically concerns the management or development of protected areas'.

Significantly therefore, a ‘protected area’ by definition encompasses a ‘protected environment’, which, in turn, includes an area ‘declared or designated in terms of provincial legislation’.

[13] Importantly, there is as well s 12 of NEMPAA, which reads:

‘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.’

Section 12 is a deeming provision. Such a provision is employed by the legislature to ‘denote merely that the persons or things to which it relates are to be considered to be what really they are not, without in any way curtailing the operation of the Statute in respect of other persons or things falling within the ordinary meaning of the language used’ (*Chotabhai v Union Government (Minister of Justice) and Registrar of Asiatics* at 33).[16] Interpretation must be solved by linguistic construction, and albeit not an entirely happily worded section, the safest clue to its meaning is to look at the language which the Legislature has itself employed. In terms of the s 12, a protected area that was reserved or protected in terms of provincial legislation is entitled to be regarded as a nature reserve or protected environment for the purposes of NEMPAA. The effect of this provision is thus to extend the protection afforded to a nature reserve by NEMPAA, to a protected area reserved in terms of provincial legislation as well. The deeming provision serves to broaden the scope of NEMPAA to include within its reach a protected area reserved or protected by provincial legislation.

[14] Textually and lexically the words ‘declaration’ and ‘designation’ bear different meanings. According to the Concise Oxford English Dictionary:

‘declaration’ means, inter alia, ‘a formal or explicit statement or announcement’ . . . ‘an act of declaring’; and

‘designation’ means ‘the action of giving someone or something a specified name, position, or status’; ‘an official title or description’.

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[16] *Chotabhai v Union Government (Minister of Justice) and Registrar of Asiatics* 1911 AD 13 at 33.

The NEMPAA thus contemplates the protection of areas that have been either 'declared or designated' in terms of provincial legislation. And, the definition of a nature reserve in NEMPAA includes areas 'designated in terms of provincial legislation'.

[15] The effect of the 1996 Proclamation was thus that the designated area was reserved or protected in terms of provincial legislation for a purpose for which it could be declared as a nature reserve or protected environment under s 12 of the NEMPAA. The High Court took the view that because the description of the area therein is vague, it must be regarded as void. It is so that if it is impossible for the court to say what area was intended to be included, the 1996 Proclamation must be regarded as void. But, as Centlivres JA pointed out in *Pretoria Timber Co.* at 170[17] 'it is . . . the duty of the Court to avoid, if possible, the conclusion that the Notice is too vague to be effective'. In that case (at 176 F-G), Schreiner JA observed:

> 'The degree of certainty, clarity or precision that must be present in such a description as the one in question, on pain of invalidity, depends on the circumstances, including the nature of the problem to be solved by the framer of the description. . . . The law requires reasonable and not perfect lucidity and the fact that cases may arise in which it would be difficult, perhaps extremely difficult, to decide whether a place falls within or outside the area is not, by itself, a reason for holding that the description is not reasonably clear.'

More recently, the Constitutional Court had occasion in *Affordable Medicines Trust v Minister of Health* 2006 (3) SA 247 (CC) to consider the doctrine of vagueness. It stated (para 108):

> 'The doctrine of vagueness is founded on the rule of law, which, as pointed out earlier, is the foundational value of our constitutional democracy. It requires that laws must be written in a clear and accessible manner. What is required is reasonable certainty not perfect lucidity. The doctrine of vagueness does not require absolute certainty of laws. The law must indicate with reasonable certainty to those who are bound by it what is required of them so that they may regulate their conduct accordingly. The doctrine of vagueness must recognise the role of Government to further legitimate social and economic objectives. And should not be used unduly to impede or prevent the furtherance of such objectives.'

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[17] *R v Pretoria Timber Co (Pty) Ltd* 1950 (3) 163 (A).

[16] There are certain considerations which I think must be borne in mind in approaching the problem. As Schreiner JA pointed out in *Jaga v Dönges NO* at 664H[18] 'the legitimate field of interpretation should not be restricted as a result of excessive peering at the language to be interpreted without sufficient attention to the contextual scene.' Context, the learned judge of appeal explained (at 662H), 'is not limited to the language of the rest of the statute regarded as throwing light of a dictionary kind on the part to be interpreted. Often of more importance is the matter of the statute, its apparent scope and purpose, and, within limits, its background.' There is no evidence to suggest that the area cannot be ascertained. And, whilst it is so that one must use outside evidence as conservatively as possible, 'one must use it if it is necessary to reach what seems to be a sufficient degree of certainty as to the right meaning' (*Delmas Milling Co Ltd v Du Plessis* at 454). One is thus entitled in a situation such as the present to have regard to extrinsic evidence of an identificatory nature to clear up ambiguity or uncertainty (*Delmas Milling Co Ltd v Du Plessis* at 454).[19] Recourse can be had to such provable surrounding circumstances as might throw light on and clarify the meaning to be given to the description of the area (*R v Pretoria Timber Co (Pty) Ltd* at 175 D-E).

[17] The reference to the 'Barberton Nature Reserve' in the 1996 Proclamation had the meaning given and applied to it by the provincial authorities since at least 1985. When regard is had to the nature of the 1996 Proclamation as a 'designation' and to its context – including its relationship to the 1985 Resolution and the administration of the land as the Barberton Nature Reserve since then, it cannot be said that the persons to whom it is addressed would be left in any uncertainty. Since the 1996 Proclamation was a designation of an area already as a matter of fact reserved, its validity and effectiveness did not require a detailed description of the area concerned, as the High Court found. To achieve its purpose, the 1996 Proclamation could simply indicate the designated area by name, as it did. It enabled members of the public to comprehend that the named areas were classified as 'conservation areas' under the ETPB Act.

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[18] *Jaga v Dönges NO*; *Bhana v Dönges NO* 1950 (4) SA 653 (A).
[19] *Delmas Milling Co Ltd v Du Plessis* 1955 (3) SA 447 (A) at 454.

[18] Common sense, I daresay, must prevail. It cannot be, to borrow from *Van Wyk v Rottcher's Saw Mills (Pty) Ltd* (at 989),[20] that what is required, under pain of nullity, is a 'faultless description . . . couched in meticulously accurate terms'. To be sure, the court was there concerned with the validity of a written agreement of sale of land under one of the predecessors of the present s 2(1) of the Alienation of Land Act 68 of 1981.[21] As *Van Wyk v Rottcher's Saw Mills*[22] made plain 'provided the land sold is described in such a way that it can be identified by applying the ordinary rules of construction of contracts and admitting such evidence to interpret the contract as is evidence under the parol evidence rule . . . the provisions of the law are satisfied.' Albeit a less than perfect analogy, it is nonetheless instructive that our courts have been willing to hold that the test for compliance with that section is whether the land sold can be identified on the ground by reference to the provisions of the contract (*Clemens v Simpson* at 7F-G).[23]

[19] What was said in those cases with reference to contracts of sale of land is of equal application to contracts of suretyship in terms of s 6 of the General Law Amendment Act 50 of 1956.[24] In that context, the following dictum by Corbett JA in *Trust Bank of Africa Ltd v Frysch* 1977 (3) SA 562 (A) at 586 D-F bears repeating:

'This being essentially a question of applying the language of the contract to the facts of the case, one is entitled, in doing so, to have regard to evidence of an indentificatory nature (*Delmas Milling Co Ltd v Du* Plessis 1955 (3) SA 447 (A.D.) at p 454). This would include, in the present case, evidence of the conclusion of the hire-purchase agreement relating to the cash register machines and of its proposed and actual transfer and cession to Trust Bank. If regard be had to the terms of the suretyship agreement, considered in the light of such identificatory evidence, I do not think that there can be any doubt that it was this hire-purchase agreement, and the obligations owing by the purchaser thereunder, that were being guaranteed by Frysch to Trust Bank. It is true that these obligations were, in effect, misdescribed as being presently

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[20] *Van Wyk v Rottcher's Saw Mills (Pty) Ltd* 1948 (1) SA 983 (A) at 989.
[21] The section reads: 'No alienation of land . . . shall . . . be of any force or effect unless it is contained in a deed of alienation signed by the parties thereto or by their agents acting on their written authority.'
[22] *Van Wyk v Rottcher's Saw Mills (Pty) Ltd* 1948 (1) SA 983 (A) at 989.
[23] *Clemens v Simpson* 1971 (3) SA 1 (A) at 7F-G; see also inter alia *JR 209 Investments v Pine Villa Estates* 2009 (4) SA 302 (SCA) and *Exdev (Pty) Ltd v Pekudei Investments (Pty) Ltd* 2011 (2) SA 282 (SCA).
[24] Section 6 of Act 50 of 1956 provides: 'No contract of suretyship entered into after the commencement of this Act, shall be valid, unless the terms thereof are embodied in a written document signed by or on behalf of the surety. . . .' See *Trust Bank of Africa Ltd v Cotton* 1976 (4) SA 325 (N) at 329G-H.

owing but I do not regard this misdescription to be of so vital or fundamental a nature as to lead one to the view that the obligations cannot be identified as those arising under the hire-purchase agreement in question and, therefore, that there is no subject matter to which the language of the suretyship contract can be applied. On the contrary, it seems to me that, as far as identification is concerned, this misdescription does no more detract from the efficacy of the contract than, say, a minor deviation in the description of the area of land sold under a sale *ad corpus* . . . or a *falsa demonstatio* in a deed of grant . . .'.

[20] I accordingly incline to the view that the area is indicated with sufficient certainty to meet the challenge that the 1996 Proclamation is void for vagueness. And, as the 1996 Proclamation meets the requirements of s 12 of the NEMPAA, it follows that the prospecting area falls to be protected against prospecting under s 48(1) of that Act. In those circumstances as the High Court was, in effect, being asked to compel an illegality, which it could not do (*Hoisain v Town Clerk, Wynberg*),[25] Barberton Mines' application ought to have failed.

[21] It follows that the appeal must succeed and it is accordingly upheld. As to costs: In this court the appellants sought leave to adduce further evidence on appeal. That application was opposed by Barberton Mines. During argument it became apparent that the evidence sought to be introduced was not relevant to the determination of the appeal. That the application must accordingly be dismissed with costs. Save for those costs, the appellants are entitled to the remaining costs of the appeal. The appellants were ordered to pay the costs of Barberton Mines' application by the high court. And, although it declined to grant condonation to the appellants, which had the effect of its counter application failing, it made no order as to costs in that regard. As there is no cross appeal by Barberton Mines I need say nothing further on that score.

[25] *Hoisain v Town Clerk, Wynberg* 1916 AD 236.

[22] In the result:

(a) Save for dismissing the appellants' application for leave to adduce further evidence with costs, the appeal is upheld with costs, such costs in each instance to include those consequent upon the employment of two counsel.

(b) The order of the court below is set aside and in its stead is substituted:

'The application is dismissed with costs.'

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V M Ponnan
Judge of Appeal

APPEARANCES:

For Appellants:	MA Wesley (with him J Bleazard)
	Instructed by: Richard Spoor Inc Attorneys, Johannesburg Webbers Attorneys, Bloemfontein
For First Respondent:	P Lazarus SC (with him I Currie)
	Instructed by: Malan Scholes Attorneys, Johannesburg Claude Reid Attorneys, Bloemfontein