THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 971/12
Reportable

In the matter between:

HARMONY GOLD MINING COMPANY LTD	**APPELLANT**
and	
REGIONAL DIRECTOR: FREE STATE DEPARTMENT OF WATER AFFAIRS	**FIRST RESPONDENT**
NATIONAL MANAGER: COMPLIANCE MONITORING AND ENFORCEMENT UNIT OF THE DEPARTMENT OF WATER AFFAIRS	**SECOND RESPONDENT**
MINISTER OF WATER AND ENVIRONMENTAL AFFAIRS	**THIRD RESPONDENT**
ANGLOGOLD ASHANTI LTD	**FOURTH RESPONDENT**
SIMMER AND JACK MINES LTD	**FIFTH RESPONDENT**
SIMMER AND JACK INVESTMENTS (PTY) LTD	**SIXTH RESPONDENT**
STILFONTEIN GOLD MINING COMPANY LTD (IN LIQUIDATION)	**SEVENTH RESPONDENT**

Neutral citation: *Harmony Gold Mining Company Ltd v Regional Director: Free State Department of Water Affairs* (971/12) [2013] ZASCA 206 (4 December 2013)

Coram: Navsa ADP, Brand and Shongwe JJA and Zondi and Meyer AJJA

Heard: **25 November 2013**

Delivered: **4 December 2013**

Summary: **Directive in terms of s 19(3) of the National Water Act 36 of 1998 – whether directive: (a) became invalid or unenforceable vis-à-vis gold mining company that was required to take anti-pollution measures when it ceased to be a person who owns, controls, occupies or uses land on which gold mining operations were undertaken that caused pollution (b) is invalid for want of specifying date by which the anti-pollution measures must be completed; (c) in its own terms is infinite and therefore invalid; or (d) of itself by implication came to an end.**

ORDER

On appeal from: North Gauteng High Court, Pretoria (Makgoka J sitting as court of first instance):

The appeal is dismissed with no order as to costs.

JUDGMENT

Meyer AJA (Navsa ADP, Brand and Shongwe JJA and Zondi AJA concurring):

[1] This appeal arises out of a directive issued by the Acting Regional Director of the Department of Water Affairs (the Regional Director) on 1 November 2005 in terms of s 19(3) of the National Water Act 36 of 1998 (the NWA). The directive was issued to the appellant, Harmony Gold Mining Company Limited (Harmony), and to the other gold mining companies that undertook gold mining operations in the Klerksdorp – Orkney – Stilfontein – Hartbeesfontein (KOSH) area in the North-West Province, namely the fourth respondent, AngloGold Ashanti Limited (AngloGold), the fifth and sixth respondents, Simmer and Jack Mines and Simmer and Jack Investments (Pty) Ltd (collectively referred to as Simmers), and the seventh respondent, Stilfontein Gold Mining Company Limited (Stilfontein). It required these companies to take anti-pollution measures in respect of ground and surface water contamination caused by their gold mining activities. Harmony ceased to be engaged in mining operations in the KOSH area on 27 February 2008. It then asserted that once it no longer had any connection to the land in question, the directive became invalid or unenforceable against it, a view not shared by most of the respondents.

[2] Gold mining operations by a number of different gold mining companies have been undertaken in the KOSH area since at least 1952.

Gold mining, inter alia, entails the sinking of shafts, construction of underground tunnels and the excavation of rock to access and remove gold bearing ore. The KOSH area has shallow aquifers containing uncontaminated water relatively close to the surface. Many years of gold mining resulted in all the mines in the KOSH area being linked underground. The labyrinth of interconnecting tunnels, shafts, mined out areas and natural fissures create a pathway through which the underground water flows from the aquifers into the shallower mines and shafts and from there into the deeper ones. It is undisputed that each mining company which has mined gold in the KOSH area over the years contributed to the perpetual draining of underground water into the mines.

[3] The rock from which the gold bearing ore is removed contains pyrite (iron sulphide) which oxidises when exposed to oxygen. Sulphuric acid (also called 'acid rock' or 'acid mine drainage') is formed when the iron oxide comes into contact with water and it creates acidic conditions that cause salts, iron and other heavy metals present in the mineral rock to dissolve in the water. The longer the water is in contact with the rock the more acidic it becomes and the more salts and heavy metals dissolve in it. These salts, acids and heavy metals have toxic and other detrimental effects on humans and the environment. The uncontrolled release of untreated acid mine drainage into the environment results in pollution of underground and surface water resources.

[4] African Rainbow Minerals Gold Limited (ARMGold) used to own land on which it operated Shafts one to seven of its Vaal River Operations at Orkney in the KOSH area. Harmony acquired the issued share capital of ARMGold during September 2003. It thereafter managed the gold mining operations of ARMGold at Orkney, although the ownership of the land remained vested in ARMGold. It is common cause that the gold mining activities under the control of Harmony 'were, and are, a source of potential pollution to the underground water in the area'.

[5] The Regional Director issued a series of directives in terms of s 19(3) of the NWA during the course of 2005, which directives were aimed at

requiring the companies undertaking gold mining in the KOSH area to take reasonable measures to prevent pollution of underground and surface water resources in the vicinity of the mining activities. The measures that were identified included the removal and treatment to an acceptable quality of underground water before exposure to the underground workings.

[6] Section 19(3) vests certain powers in a catchment management agency. Section 72(1), however, provides that the powers of a catchment management agency vest in the Minister of Water Affairs in areas (such as the KOSH area) for which a catchment management agency has not been established. In issuing the directives the Regional Director acted in this case under the Minister's powers delegated to him.

[7] On 1 November 2005, the Regional Director issued another directive in the series to Harmony, AngloGold, Simmers and Stilfontein, which directive forms the subject matter of the present dispute (the directive). The Regional Director recorded in the directive that the five mining companies '. . . are owners of land, persons in control of land, occupiers of land or users of land, on which mining activities or processes are or were performed or undertaken, or in respect of which and on which a situation exists, which causes, has caused or is likely to cause pollution of a water resource.' It is further recorded that their workings '. . . are interlinked and part of a hydraulic unit in respect of water found underground, which needs to be removed at the most advantageous position to prevent the pollution of ground and surface water resources and to ensure the continuation of mining activities, and the safety of people'.

[8] Harmony and the other mining companies were directed to '. . . submit an agreement and a joint proposal towards the long term sustainable management of water arising from mining activities in the KOSH area'. Apart from being directed to ensure that the agreement and joint proposal comply with the requirements listed in the directive, Harmony, in particular, in the interim ('until the implementation of an agreement and joint proposal') was directed to:

'1. . . .

a. ensure the management of any water found underground or arising in the KOSH basin that may affect the current and potential future operations of mines that is or was under its control, which management encompasses, but is not limited to, the collection at the most appropriate location, removal, treatment to general effluent standards specified in GN. R. 991 (GG9225 of 18 May 1984), and either re-use in a legal and approved manner, or discharge into a water resource at a location approved by the Regional Director in a legal manner in terms of Chapter 4 of the NWA;

b. ensure the continued operation and maintenance of all infrastructure associated with any aspect of the management of the water found underground, and in this respect, continue to provide the Regional Director with a weekly report regarding the status of such infrastructure, as well as the provisions made to ensure such continued operation and maintenance, to be submitted every Friday, which reporting obligation commenced on 22 April 2005 under the previous Directive dated 13 April 2005.

2. . . . ensure that the water found underground is managed as follows:

a. 1,8 ML/day of water found underground at Harmony #7 shaft is to be collected and removed to surface by Harmony Gold Mining Company Limited, reused by Harmony Gold Mining Company Limited in a legal and approved manner in terms of Chapter 4 of the National Water Act 36 of 1998, and the cost for such collection, removal and re-use is to be carried by Harmony Gold Mining Company Limited;

b. 3,1 ML/day of water found underground at Margaret Shaft, is to be collected and removed to surface, treated to comply with general effluent standards specified in GN.R. 991 (GG9225 of 18 May 1984), and either re-used in a legal and approved manner, or discharged into a water resource at a location approved by the Regional Director in a legal manner, in terms of Chapter 4 of the NWA.

3. . . . ensure that the cost of taking the measures under clause 2(b), including the cost for ensuring the continued operation and maintenance of all infrastructure associated with any aspect of the management of the water found underground, is shared equally between AngloGold Ashanti Limited, Harmony Gold Mining Company Limited, Stilfontein Gold Mining Company and Simmers. In the event that any of the mining companies does not contribute to the costs, the other mining companies must share the full costs

between themselves, and recover the cost on their own means from such company.

4. . . . continue to provide the Regional Director with a weekly report, to be submitted every Friday, which reporting obligation commenced on 13 May 2005 under the previous Directive dated 7 May 2005, regarding the following:
   a. volume of water removed from underground at each location of removal;
   b. quality of water removed from underground at each location of removal;
   c. status of management measures used for the collection, removal, storage, treatment and disposal of water so removed;
   d. volume and quality of water prior to and after any use and treatment thereof;
   e. location(s) of final disposal of water removed from the underground;
   f. volume and quality of water prior to such final disposal; and
   g. quality of the receiving water resource to which water is so disposed, both upstream and downstream from the location of final disposal.'

[9] Thus, the directive required the gold mining companies concerned to manage, collect, treat and use or dispose of subterranean water that might affect the current and future operations of mines in the KOSH area and to share the costs of taking such measures equally. This includes the obligation to extract underground water at a particular point (Margaret Shaft) by means of pumping and to treat the water to comply with general effluent standards. The directive was issued as an interim measure '. . . in order to ensure that measures to prevent pollution will continue to be taken . . . until the implementation of an agreement and joint proposal towards the long term sustainable management of water arising from the mining activities in the KOSH area'. The directive concludes by informing the mining companies that '[s]hould a joint solution . . . not be forthcoming in an un-facilitated and un-mediated manner, the Minister of Water Affairs and Forestry may be requested to consider the issuing of a Directive in terms of section 150 of the NWA'.[1]

[1] Section 150(1) reads: 'The Minister may at any time and in respect of any dispute between any person relating to any matter contemplated in this Act, at the request of a person involved or on the Minister's own initiative, direct that the persons concerned attempt to settle their dispute through a process of mediation and negotiation'.

[10] Stilfontein was subsequently placed in liquidation. Harmony, AngloGold and Simmers shared the costs associated with the pumping and treatment of water found underground at Margaret Shaft. However, no agreement towards the long term sustainable management of water arising from the mining activities in the KOSH area has yet been reached.

[11] On 29 August 2007 ARMGold entered into a sale of business agreement with Pamodzi Gold Orkney (Pty) Ltd (Pamodzi) in terms of which Pamodzi acquired the entire gold mining business and land of ARMGold in the KOSH area, and it assumed all Harmony's obligations, including those arising from the directive, in respect of the mining operations at Orkney. The sale became unconditional and was implemented on 27 February 2008 when Harmony ceased to manage those mining operations. Pamodzi, as a result of financial difficulties, only paid Harmony's one third contribution to the monthly costs associated with the pumping and treatment of water found underground at Margaret Shaft for the period March until May 2008. That obligation arising from the terms of the directive was thereafter resumed by Harmony. ARMGold's land on which the mining operations at Orkney were conducted was transferred to Pamodzi on 6 January 2009. Pamodzi was provisionally liquidated on 20 March 2009 and subsequently placed under final liquidation.

[12] Harmony (as I have mentioned by way of introduction) asserted that a directive issued under s 19(3) remains valid only for as long as the person to whom it was issued owns, controls, occupies or uses the land in question. For present purposes, they are the persons listed in s 19(1) who were collectively referred to by the court a quo and by counsel as 'landholders' and I adopt the term for the sake of brevity. The directive, Harmony asserted, became invalid or unenforceable against it as from 6 January 2009, when the land was transferred to Pamodzi, because it ceased to be a landholder on that date. Simmers and AngloGold took issue with Harmony's interpretation of s 19(3). They advised Harmony that a cessation of its monthly contributions to the costs associated with the pumping and treatment of the underground water would be unlawful. In a letter dated 28 August 2009 that was

addressed to the Department of Water Affairs a request was made by Harmony's attorneys that the directive be withdrawn against it. The request was refused on 21 September 2009.

[13] Hence the application in the North Gauteng High Court in terms of which Harmony sought the review and setting aside of the directive or of the refusal to withdraw it, a declaration that it became invalid on 6 January 2009 and ancillary relief. The application was opposed by the first three respondents and by Simmers. In essence the merits of the application fell to be determined by an interpretation of s 19(3). Makgoka J rejected the interpretation contended for by Harmony. The application was dismissed and no order as to costs was made. It is against that order that Harmony appeals to this court with the leave of the court a quo.

[14] Part 4 of Chapter 3 of the NWA has one section, which is s 19. Part 4 reads:

'*Part 4: Pollution prevention*

Part 4 deals with pollution prevention, and in particular the situation where pollution of a water resource occurs or might occur as a result of activities on land. The person who owns, controls, occupies or uses the land in question is responsible for taking measures to prevent pollution of water resources. If these measures are not taken, the catchment management agency concerned may itself do whatever is necessary to prevent the pollution or to remedy its effects, and to recover all reasonable costs from the persons responsible for the pollution.

19. Prevention and remedying effects of pollution

(1) An owner of land, a person in control of land or a person who occupies or uses the land on which-

(*a*) any activity or process is or was performed or undertaken; or

(*b*) any other situation exists,

which causes, has caused or is likely to cause pollution of a water resource, must take all reasonable measures to prevent any such pollution from occurring, continuing or recurring.

(2) The measures referred to in subsection (1) may include measures to-

(*a*) cease, modify or control any act or process causing the pollution;

(*b*) comply with any prescribed waste standard or management practice;

(*c*) contain or prevent the movement of pollutants;

(*d*) eliminate any source of the pollution;

(*e*) remedy the effects of the pollution; and

(*f*) remedy the effects of any disturbance to the bed and banks of a watercourse.

(3) A catchment management agency may direct any person who fails to take the measures required under subsection (1) to-

(*a*) commence taking specific measures before a given date;

(*b*) diligently continue with the measures; and

(*c*) complete them before a given date.

(4) Should a person fail to comply, or comply inadequately with a directive given under subsection (3), the catchment management agency may take the measures it considers necessary to remedy the situation.

(5) Subject to subsection (6), a catchment management agency may recover all costs incurred as a result of it acting under subsection (4) jointly and severally from the following persons:

(*a*) Any person who is or was responsible for, or who directly or indirectly contributed to, the pollution or the potential pollution;

(*b*) the owner of the land at the time when the pollution or the potential for pollution occurred, or that owner's successor-in-title;

(*c*) the person in control of the land or any person who has a right to use the land at the time when-

(i) the activity or the process is or was performed or undertaken; or

(ii) the situation came about; or

(*d*) any person who negligently failed to prevent-

(i) the activity or the process being performed or undertaken; or

(ii) the situation from coming about.

(6) The catchment management agency may in respect of the recovery of costs under subsection (5), claim from any other person who, in the opinion of the catchment management agency, benefitted from the measures undertaken under subsection (4), to the extent of such benefit.

(7) The costs claimed under subsection (5) must be reasonable and may include, without being limited to, labour, administrative and overhead costs.

(8) If more than one person is liable in terms of subsection (5), the catchment management agency must, at the request of any of those persons, and after giving the others an opportunity to be heard, apportion the liability, but such apportionment does not relieve any of them of their joint and several liability for the full amount of the costs.'

[15] Subsection (1) applies whenever there is land on which any activity or process is or was performed or undertaken or any other situation exists, which causes, has caused or is likely to cause pollution of a water resource. The duty to take all reasonable measures to prevent pollution from occurring, continuing or recurring is imposed upon the person who owns, controls, occupies or uses the land (the landholder). The measures to be taken 'may include' those referred to in subsec (2). In *Harmony Gold Mining Co Ltd v Regional Director: Free State, Department of Water Affairs and Forestry* [2006] SCA 65 (RSA) this court held that '[t]he wording here is "may include" and that unquestionably signifies that the list in s 19(2) is not exclusive'.[2] It was held that '[t]he legislature intended by the term "reasonable measures" to lay down a flexible test dependent on the circumstances of each case' and that the measures required of a landholder are not limited to measures only on the land mentioned in subsec (1).[3]

[16] Subsection (3) is triggered by a landholder's failure to take the measures required under subsec (1). A catchment management agency or the Minister or the Minister's delegate (depending on whether a catchment management agency has been established for the area) may then direct the landholder to commence taking specific measures before a given date, diligently continue with those measures and complete them before a given date. Subsections (4) to (8) are triggered when the defaulting landholder also fails to comply fully with the directive issued under subsec (3). The Minister may then take the measures he or she considers necessary to remedy the situation and recover all costs of doing so from a range of persons wider than those listed in subsec (1).

[17] In managing ARMGold's gold mining operations at Orkney, Harmony exercised control over and used the land from September 2003 until 27 February 2008. It was indisputably a person within the meaning of subsec (1) who controlled, occupied and used land on which an activity was performed or undertaken which caused or was likely to cause pollution of a water resource at the time when the Regional Director issued the directive. It was not the

[2] Para 28.
[3] Para 33.

owner of the land in question and its contention that it remained a landowner until the land was transferred to Pamodzi on 6 January 2009 is obviously wrong.

[18] On appeal Harmony argued that the Minister's powers under subsec (3) are subject to the limitation that the landholder may only be directed to take anti-pollution measures for as long as it remains the person who owns, controls, occupies or uses the land. The obligation to take anti-pollution measures in terms of subsec (1) does not apply to a person when it is no longer a landholder. '[T]he stream would rise higher than its source' and there would be no rationale for the result, Harmony argued, if the obligations ensuing from a subsec (3) directive, which 'crystallise' and enforce the subsec (1) obligations, continued to apply to a person when it is no longer a landholder. Harmony also argued that its interpretation of subsec (3) is supported by the maxim *cessante ratione legis cessat ipsa lex* (the presumption that a law ceases to operate if the reason for it falls away).[4] Once the jurisdictional prerequisite of landholding is lacking, it was argued, the legal basis for the directive falls away and thus its validity or enforceability.

[19] In *Harmony* (supra) this court held that '[t]he task of construing s 19 must commence with reference to s 24 of the Constitution'.[5] It confers on everyone 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 – (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'. Anti-pollution legislative measures are, amongst others, to be found in the National Environmental Management Act 107 of 1998 (NEMA) and the NWA.

[20] The principles enumerated in s 2 of NEMA '. . . apply throughout the Republic to the actions of all organs of state that may significantly affect the

---

[4] See: *Labuschagne v Labuschagne; Labuschagne v Minister van Justisie* 1967 (2) SA 575 (A) at 587D-G..
[5] Para 17.

environment and . . . guide the interpretation, administration and implementation of [NEMA], and any other law concerned with the protection or management of the environment,.[6] These principles '. . . must be observed as they are of considerable importance to the protection and management of the environment'.[7] One principle is '. . . that negative impacts on the environment and on people's environmental rights be anticipated and prevented, and where they cannot be altogether prevented, are minimised and remedied'.[8] And another is that '[t]he costs of remedying pollution, environmental degradation and consequent adverse health effects and of preventing, controlling or minimising further pollution, environmental damage or adverse health effects must be paid for by those responsible for harming the environment'.[9]

[21] Howie P, in *Harmony* (supra), said the following regarding the NWA:

'[18] The Act's preamble recognizes the need to protect the quality of water resources to ensure sustainability of the nation's water resources in the interest of all water users.

[19] The purpose of the Act is stated in s 2 to be to ensure that the nation's water resources are, *inter alia* protected, conserved and managed so as to take into account

"(h) reducing and preventing pollution and degradation of water resources."

. . .

[21] Section 3 declares that the National Government, acting through the Minister, is the public trustee of the nation's water resources and must ensure that water is, *inter alia*, protected, conserved and managed in a sustainable and equitable manner for the benefit of all.

[22] As regards the appropriate approach to the present task [being the proper interpretation of the relevant provisions of s 19 of the NWA], s 1(3) requires any reasonable interpretation which is consistent with the purpose of the Act to be preferred over any alternative interpretation inconsistent with that purpose.'

---

[6] Section 2(1)(e) of NEMA.

[7] Per Ngcobo J in *Fuel Retailers Association of Southern Africa v Director-General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province & others* 2007 (6) SA 4 (CC) para 67.

[8] Section 2(4)(*a*)(viii) of NEMA.

[9] Section 2 (4)(*p*) of NEMA.

[22] The limitation contended for by Harmony is not expressly provided for in subsec (3) and will thus have to be read into it by implication. Corbett JA, in *Rennie NO v Gordon & another* 1988 (1) SA 1 (A), said that '[w]ords cannot be read into a statute by implication unless the implication is a necessary one in the sense that without it effect cannot be given to the statute as it stands'.[10] I am of the view that effect can be given to the NWA 'as it stands' without the need to limit the Minister's wide discretionary powers under subsec (3) as Harmony would have it.

[23] The wording of subsec (3) makes it plain that the legislature intended to vest the Minister with wide discretionary powers and to leave it to him or her to determine what measures a defaulting landholder must take and for how long it must continue to do so. I find nothing in the wording of subsec (3) or in the other provisions of s 19 which warrants the conclusion that the Minister's powers under subsec (3) are intended to be limited in that he or she may only order the landholder to take anti-pollution measures for as long as it remains a landholder. Subsection (3) permits the Minister to impose 'specific measures' which are not confined to those a landholder must take in terms of subsec (1). The measures imposed by the Minister may well be more burdensome than those under subsec (1). The Minister's powers under subsecs (4) to (8) are also triggered by a landholder's default (in this instance its failure to comply fully with the Minister's directive issued under subsec (3)), but the Minister's powers under subsecs (4) to (8) are much more extensive (measures the Minister 'considers necessary to remedy the situation') than mere enforcement of the duties of the defaulting landholder.

[24] The rationale of subsec (3) is to direct the landholder to address the pollution or risk of pollution however long it may take to do so. That rationale does not fall away when the landholder ceases to own, control, occupy or use the land. The limitation of the Minister's power as contended for by Harmony is not only unnecessary to give effect to the purpose of subsec (3), but on the

---

[10] At 22E-F. Reiterated by the Constitutional Court in *Bernstein v Bester & others NNO* 1996 (2) SA 751 (CC) para 105; *National Director of Public Prosecutions v Mohamed* 2003 (4) SA 1 (CC) para 48; and *Geuking v President of the Republic of South Africa* 2003 (3) SA 34 (CC) para 20.

contrary defeats its purpose and renders it ineffective. The landholder directed to take measures under subsec (3) would then easily be able to evade its obligations in terms of the directive by simply severing its ties with the land. It could, by way of example, simply transfer the land to a bankrupt subsidiary. Harmony's restrictive interpretation of ss (3) would result in the absurdity that a polluter could walk away from pollution caused by it with impunity, irrespective of the principle that it must pay the costs of preventing, controlling or minimising and remedying the pollution.

[25] An interpretation that does not impose the limitation on the Minister's powers under subsec (3) contended for by Harmony is consistent with the purpose of the NWA (reducing and preventing pollution and degradation of water resources); accords with the NEMA principles that pollution be avoided or minimised and remedied and that the costs of preventing, minimising, controlling and remedying pollution be paid for by those responsible for harming the environment; and gives expression and substance to the constitutionally entrenched right of everyone to an environment that is not harmful to health or well-being and to have it protected through reasonable measures that amongst others prevent pollution and ecological degradation.

[26] I conclude therefore that the Minister's powers under subsec (3) are not subject to the limitation that he or she may only direct a landholder to take anti-pollution measures for as long as it remains a person who owns, controls, occupies or uses the land.

[27] Harmony argued further that paragraphs (*a*) to (*c*) of subsec (3) are cumulative; that the word 'and' must be read conjunctively; and that it is accordingly a mandatory requirement that a directive issued under subsec (3) specifies a given date by when the required measures must be completed. The directive under consideration does not satisfy that mandatory requirement, so it argued, and is accordingly invalid and falls to be set aside. Harmony's interpretation overlooks the permissive nature of the Minister's powers under subsec (3). The Minister 'may' decide to issue a directive and to direct the 'specific measures' that must be taken. In any event, the directive

envisaged a date by which the measures would terminate, namely when agreement was reached on an acceptable future solution.

[28] Harmony at the hearing of the appeal for the first time argued that on its own terms the directive was not envisaged to operate against a 'non-landholder' and that it ceased to have effect vis-à-vis Harmony when it severed its ties with the land. The obligations imposed upon Harmony in terms of the directive (they are quoted in paragraph 8 supra of this judgment), so it was argued, cannot be fulfilled by a person who is not the landholder. There is no merit in this argument. The obligations arising from the terms of the directive do not address the issue whether they can only be performed by a landholder. I have referred to the decision of this court in *Harmony* (supra) that the measures imposed on the landholder by subsecs (1) and (2) are not confined to the landholder's land. In my view the same holds true for measures required in terms of a directive issued under subsec (3). In any event, Harmony has thus far complied with its obligations arising from the directive even though it had not been the landowner since 27 February 2008.

[29] Harmony then argued (also for the first time on appeal) that in its terms the directive requires measures that are infinite and that the directive is therefore invalid. This argument is in conflict with the clear terms of the directive. It is recorded that the measures are required to be taken in the interim in order to ensure that measures to prevent pollution will continue to be taken until the implementation of an agreement and joint proposal towards the long term sustainable management of water arising from the mining activities in the KOSH area. There was no evidence placed before the court a quo that the pumping and treatment of the underground water would continue in perpetuity. The long term sustainable management of the subterranean water may achieve the cessation of pumping, but I need not speculate about this. The directive in its terms is not infinite.

[30] When the shoe pinched Harmony adapted its argument, without intending to be unkind, rather opportunistically. It then argued that having been a mere interim measure pending the implementation of an agreement, the directive by implication came to an end when it became clear that

agreement would never be reached. This argument, however, involves questions of fact that have not been canvassed on the affidavits. If indeed agreement cannot be reached (and such a finding cannot be made on the affidavit evidence before us) then the Minister may issue a directive under s 150 (either at the request of a party involved or on the Minister's own initiative) that requires the mining companies concerned to attempt to settle their dispute through a process of mediation and negotiation. These aspects (a s 150 directive and mediation process) have also not been addressed on the affidavits.

[31] The court a quo correctly dismissed Harmony's application. Makgoka J was also correct in following '. . . the general approach of not awarding costs against an unsuccessful litigant in proceedings against the State, where matters of genuine constitutional import arise'.[11] Each party should also bear its own costs of the appeal.

[32] The appeal is dismissed with no order as to costs.

_____

P A MEYER
ACTING JUDGE OF APPEAL

[11] Per Sachs J in *Biowatch Trust v Registrar, Genetic Resources* 2009 (6) SA 232 (CC) paras 23-24.

APPEARANCES:

For Appellant:	A M Stewart SC (with him K S Hofmeyr)
	Instructed by:
	DLA Cliffe Dekker Hofmeyr, Cape Town
	McIntyre & Van der Post, Bloemfontein
For First to Third Respondent:	B Roux SC (with him T A N Makhubele)
	Instructed by:
	The Office of the State Attorney, Pretoria
	The Office of the State Attorney, Bloemfontein