



2017 Interdict Application

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Description:

An application was brought in the KwaZulu-Natal High Court, Pietermaritzburg, for an interim interdict to stop Tendele's Somkhele mining operations until it obtains certain licences and permits, including environmental authorisation, a waste management licence, planning approval and heritage resource permits to relocate graves.

Parties:

Applicants (our clients): GET, MCEJO (and initially S. Dladla who, as of 28 October 2020, has withdrawn).

Respondents: Tendele Coal Mining (Pty) Ltd3; Minister of Minerals & Energy; MEC: Department of Economic Development, Tourism and Environmental Affairs (KZN); Minister of Environmental Affairs; Mtubatuba Municipality; Hlabisa Municipality; Ingonyama Trust; Ezemvelo KZN Wildlife; and Amafa aKwaZulu-Natali Heritage Council.

Amici curiae:

In support of the application: Centre for Environmental Rights (CER)

In opposition to the application: Mpukunyoni Traditional Council (MTC), Mpukunyoni Community Mining Forum (MCMF), Association of Mineworkers and Construction Union (AMCU) and National Union of Mineworkers (NUM).

Court hearings:

1. Court *a quo* (court in which the matter was first heard)

Case No.	KZP Case No. 11488/17P
Court	KwaZulu-Natal High Court, Pietermaritzburg
Date of Application	10 October 2017
Applicants' Advocates	Adv. AJ (Spicko) Dickson SC Adv. Mawande Mazibuko
Applicants' Correspondent Attorneys	Hay & Scott Attorneys
Hearing	24 August 2018 before Seegobin J
Judgment	20 October 2020 in favour of Tendele

2. Application for Leave to Appeal to Supreme Court of Appeal (SCA)

Case No.	KZP Case No. 11488/17P
Court	KwaZulu-Natal High Court, Pietermaritzburg
Date of Application	11 December 2018
Applicants' Advocates	Adv. Tembeka Ngcukaitobi SC Adv. Mawande Mazibuko
Applicants' Correspondent Attorneys	Hay & Scott Attorneys
Hearing	11 September 2019 before Seegobin J
Judgment	17 September 2019 in favour of GET and MCEJO

Appeal to Supreme Court of Appeal

Case No.	SCA Case No. 1105/2019
Court	Supreme Court of Appeal
Notice of Appeal	9 October 2019
Appellants' Advocates (GET & MCEJO)	Adv. Tembeka Ngcukaitobi SC Adv. Mawande Mazibuko
Appellants' Correspondent Attorneys	Phatshoane Henney Attorneys

Hearing	3 November 2020 before Ponnan, Schippers, Plasket and Nicholls JJA and Ledwaba AJA
Judgment	9 February 2021 appeal dismissed (with dissenting judgment by Schippers JA in favour of GET and MCEJO)

3. Application for Leave to Appeal to Constitutional Court

Case no.	CCT Case No. 69/21
Court	Constitutional Court
Date of Application	8 April 2021
Appellants' advocates (GET & MCEJO)	Adv. Tembeka Ngcukaitobi SC Adv. Mawande Mazibuko
Appellants' Correspondent Attorneys	Richard Spoor Inc. Attorneys
Hearing	Awaiting decision on application

The central dispute between our clients (GET and MCEJO) and Tendele Coal Mining (Pty) Ltd revolved around the interpretation of the Mineral and Petroleum Resources Development Act 28 of 2002 (MPRDA) and the National Environmental Management Act 107 of 1998 (NEMA) before the One Environmental System came into force on 8 December 2014. In short, the issue is whether the environmental impact of mining operations was exclusively dealt with under the MPRDA through approval of the Environmental Management Programme (EMP), or whether an environmental authorisation issued under NEMA was also required before mining operations could commence.

Tendele's EMPS for each of its mining rights were approved in terms of the now repealed section 39 of the MPRDA. It is Tendele's case that the transitional provisions in the National Environmental Management Amendment Act 62 of 2008 render these EMPS valid, and accordingly, they "continue to ensure that the environmental impacts of Tendele's mining operations and activities incidental thereto are properly managed." On the strength of this interpretation, Tendele claimed it was advised that it did not require NEMA environmental authorisation for its mining operations and that the environmental impacts of mining were, prior to 8 December 2014, regulated exclusively through the MPRDA.

On the facts, it was clear that Tendele has neither applied for nor been granted environmental authorisation under NEMA, but rather holds the view that its EMPS prepared and approved in terms of the MPRDA are sufficient.

Our clients demanded Tendele seek an environmental authorisation under the NEMA to ensure they are adequately regulated and mitigated.

Tendele's argument is that no environmental authorisation is required for mining rights sought before December 2014. Faced with this intransigence, our clients sought help from the courts. We applied for an interim interdict to stop Tendele from mining until it obtained environmental authorisation. The High Court sided with Tendele. After criticising the applicants' pleadings, the court found that mining rights sought before December 2014 do not require environmental authorisation. According to the High Court, the MPRDA covers all environmental impacts of mining. NEMA has no role. The High Court ordered costs against the applicants with no reference to the principles of *Biowatch*.

Our clients sought leave to appeal against this judgment. We cited the chilling effect of the costs order. We argued it was bad in law. We also pointed out that the judgement clashed with two judgments of the Western Cape High Court and one of the Gauteng High Court. Recognising this conflict, the High Court granted leave to appeal to the Supreme Court of Appeal 'in the public interest to have some finality on the issues raised by the applicants.' The Centre for Environmental Rights joined the proceedings as amicus curiae.

The majority judgment handed down by the Supreme Court of Appeal on 9 February 2021 dismissed the appeal on the basis of its pleadings. It criticised the applicants for not enumerating which specific listed activities Tendele undertook that obliged it to seek an environmental authorisation under NEMA. The majority judgment, however did not address the legal issue of the requirement for environmental authorisation under NEMA.

As a result of this SCA judgment, the law right now is as pronounced by the High Court – that environmental authorisation is not required where a mining right was applied for before December 2014.

Schippers JA, however was not persuaded by Tendele's "quibbles" about our pleadings in his dissenting judgment. He called them 'opportunistic and contrived'. Schippers JA accepted our argument that there was no genuine dispute over whether Tendele is conducting listed activities. Of course, Tendele is.

- Tendele never denied that its 'mining operations triggered any listed activity.'

- Tendele is mining ‘one of the largest resources of open-pit mineable anthracite reserves in South Africa’. This leads to an inescapable inference that it conducts listed activities.

Schippers JA then turned to the merits of the dispute, penning a judgment that would have interdicted Tendele’s mining without an environmental authorisation and ordered the first respondents to pay costs.

Boosted by this dissenting judgment, we applied to the Constitutional Court for leave to appeal the majority judgment of the Supreme Court of Appeal. We hoped that the Constitutional Court would provide finality around whether environmental authorisation is required for mining activities applied for and authorised under the MPRDA before 2014. Given the High Court’s

decision, it is not required in KwaZulu-Natal. (In the Western Cape and Gauteng, no mining may occur without an environmental authorisation.) We also hoped that the Constitutional Court would correct the High Court’s costs order and the chilling effect it has on constitutional litigation against mining companies.

On 11 January 2022, we received notice that the Constitutional Court had unfortunately dismissed our application for leave to appeal. The law around environmental authorisations for activities related to mining prior to December 2014, therefore remains murky.

Appearing for the Applicants were **Adv. Tembeka Ngcukaitobi SC** and **Adv. Mawande Mazibuko**.

Updated 13/5/2025