THE CONSTITUTIONAL COURT

Case:

In the matter between:

GLOBAL ENVIRONMENTAL TRUST	First Applicant
MFOLOZI COMMUNITY ENVIRONMENTAL ORGANISATION	Second Applicant
and	
TENDELE COAL MINING (PTY) LTD	First Respondent
MINISTER OF MINERALS AND ENERGY	Second Respondent
MEC: DEPARTMENT OF ECONOMIC DEVELOPMENT, TOURISM AND ENVIRONMENTAL AFFAIRS	Third Respondent
MINISTER OF ENVIRONMENTAL AFFAIRS	Fourth Respondent
MTUBATUBA MUNICIPALITY	Fifth Respondent
HLABISA MUNICIPALITY	Sixth Respondent
INGONYAMA TRUST	Seventh Respondent
EZEMVELO KZN WILDLIFE	Eighth Respondent
AMAFA aKWAZULU-NATALI HERITAGE COUNCIL	Ninth Respondent
CENTRE FOR ENVIRONMENTAL RIGHTS	Amicus Curiae
MPUKONYONI TRADITIONAL COUNCIL	Amicus Curiae
MPUKONYONI COMMUNITY MINING FORUM	Amicus Curiae
THE ASSOCIATION OF MINE WORKERS AND CONSTRUCTION UNION	Amicus Curiae
THE NATIONAL UNION OF MINEWORKERS	Amicus Curiae

FILING SHEET

KINDLY TAKE NOTICE that the appellant delivers their Notice of Motion, Founding Affidavit and its three annexures marked SD1, SD2 and SD3 for service and filing.

DATED AND SIGNED AT Parktown **ON THE** 2nd **DAY OF MARCH 2021.**

YOUENS ATTORNEYS
2nd Floor Office, 29 Degrees South
Dube City, Dube Trade Port, La Mercy, 4420
Email: kyouens@youensattorneys.co.za
Tel: 032 814 0240 / 061 226 6868
Richard Spoor Inc, Attorneys
Correspondent Attorneys
5 Sherborne Road
Parktown
Johannesburg
2193
Tel: 011 482 6081 / 071 383 1416
Email: tankiso@rsinc.co.za,
sonam@rsinc.co.za

TO:

THE REGISTRAR OF THE CONSTITUTIONAL COURT
JOHANNESBURG

AND TO:
MALAN SCHOLES INC.
FIRST RESPONDENT'S ATTORNEYS
Houghton, 2196, Johannesburg
85 Central Street
Email: HScholes@malanscholes.co.za
LBolz@malanscholes.co.za

AND TO:
NGCAMU INCORPORATED

SEVENTH RESPONDENT'S ATTORNEYS
Ground Floor, 229 Hoosen Haffejee Street, Pietermaritzburg 3201
P O Box 32, Pietermaritzburg 3200
Tel : 087 094 9284 Mobile : 083 439 8380 Fax : 086 210 5007
E-mail : info@ngcamulaw.co.za
Ref: Sifiso Khaya Ngcamu

AND TO AMICUS CURIAE:

DMS ATTORNEYS

3rd Floor, Sandton City Office Tower,Sandton City
Sandton, Johannesburg
E-mail: d.sibuyi@admsattorneys.co.za

AND AMICUS CURIAE:

CENTRE FOR ENVIRONMENTAL RIGHTS

2nd Floor Springtime Studios
1 Scott Road, Observatory
7925, Cape Town
Email: chorsfield@cer.org.za

THE CONSTITUTIONAL COURT

Case:

In the matter between:

GLOBAL ENVIRONMENTAL TRUST	First Applicant
MFOLOZI COMMUNITY ENVIRONMENTAL ORGANISATION	Second Applicant
and	
TENDELE COAL MINING (PTY) LTD	First Respondent
MINISTER OF MINERALS AND ENERGY	Second Respondent
MEC: DEPARTMENT OF ECONOMIC DEVELOPMENT, TOURISM AND ENVIRONMENTAL AFFAIRS	Third Respondent
MINISTER OF ENVIRONMENTAL AFFAIRS	Fourth Respondent
MTUBATUBA MUNICIPALITY	Fifth Respondent
HLABISA MUNICIPALITY	Sixth Respondent
INGONYAMA TRUST	Seventh Respondent
EZEMVELO KZN WILDLIFE	Eighth Respondent
AMAFA aKWAZULU-NATALI HERITAGE COUNCIL	Ninth Respondent
CENTRE FOR ENVIRONMENTAL RIGHTS	Amicus Curiae
MPUKONYONI TRADITIONAL COUNCIL	Amicus Curiae
MPUKONYONI COMMUNITY MINING FORUM	Amicus Curiae
THE ASSOCIATION OF MINE WORKERS AND CONSTRUCTION UNION	Amicus Curiae
THE NATIONAL UNION OF MINEWORKERS	Amicus Curiae

NOTICE OF MOTION

PLEASE TAKE NOTICE THAT the applicants intend to apply to this Court, on a date determined by the Chief Justice, for an order in the following terms:

1 The applicants are granted leave to appeal against the order handed down by the Supreme Court of Appeal (per Ponnan JA (Plasket and Nicholls JJA and Ledwaba AJA concurring)) in case number 1105/2019 delivered on 9 February 2021.

2 The appeal is upheld with costs, including the costs of two counsel.

3 The order of the Supreme Court of Appeal is set aside and replaced with the following:

3.1 The appeal succeeds with costs, including the costs of two counsel.

3.2 The order of the high court is set aside and replaced with the following:

3.2.1 It is declared that the commencement or continuation of mining operations by the first respondent on the properties listed below (the properties) is unlawful and unconstitutional, unless and until it has been granted an environmental authorisation and / or section 24G authorisation in terms of the National Environmental Management Act 107 of 1998 (NEMA), to undertake the relevant listed activities contained in the List of Activities and Competent Authorities Identified in terms of Sections 24(2) and 24D of NEMA, published under Government Notices R983, 984 and 985, in Government Gazette 38282 of 4 December 2014:

(a) Area 1 on Reserve No 3 (Somkhele) No 15822, measuring 660.5321 hectares as described in the mining right dated 22 June 2007;

(b) Areas 2 and 3 on Reserve No 3 (Somkhele) No 15822, measuring 779.8719 hectares as described in the mining right dated 30 March 2011;

(c) The KwaQubuka and Luhlanga areas on Reserve No 3, measuring 706.0166 hectares as described in the mining right dated 8 March 2013;

(d) Areas 4 and 5 on part of the remainder of Reserve No 3 No 15822, in extent to 21233.0525 hectares as described in the mining right dated 26 October 2016.

3.2.2 The order in paragraph 3.2.1 above is suspended in terms of Areas 1, 2, 8 and 9 for a period of 12 months to enable the first respondent to obtain the requisite environmental authorisation retrospectively in terms of section 24G of NEMA. In the event that the first respondent does not obtain that authorisation within the said period, it shall be entitled to apply to this Court for an extension of the period, setting out the steps taken to obtain such authorisation; the status of that application; and why a further suspension of the order in paragraph 3.2.1 is necessary.

3.2.3 The order in terms of paragraph 3.1.1 (d) and insofar as it relates to Area 3, will be effective immediately.

3.2.4 The first respondent is ordered to pay the costs of the application, including the costs of two counsel.

4 Further and/or alternative relief.

TAKE NOTICE FURTHER THAT the affidavit of **SIFISO SENZO DLADLA** and its annexures will be used in support of this application.

TAKE NOTICE FURTHER THAT if you intend to oppose this application you are required, within ten days of service of this application on you, to lodge with the Registrar and to serve on the applicants' attorneys an affidavit setting out the grounds on which you oppose the application.

TAKE NOTICE FURTHER that the applicant has appointed the offices of **YOUENS ATTORNEYS** as its attorneys of record, at the address set out below, where she will accept all notices and processes in these proceedings.

DATED AND SIGNED AT Parktown **ON THE** 2nd **DAY OF MARCH 2021.**

YOUENS ATTORNEYS
2nd Floor Office, 29 Degrees South
Dube City, Dube Trade Port, La Mercy, 4420
Email: kyouens@youensattorneys.co.za
Tel: 032 814 0240 / 061 226 6868
Richard Spoor Inc, Attorneys
Correspondent Attorneys
5 Sherborne Road
Parktown
Johannesburg
2193
Tel: 011 482 6081 / 071 383 1416
Email: tankiso@rsinc.co.za,
sonam@rsinc.co.za

TO:

THE REGISTRAR OF THE CONSTITUTIONAL COURT

JOHANNESBURG

AND TO:
MALAN SCHOLES INC.
FIRST RESPONDENT'S ATTORNEYS
Houghton, 2196, Johannesburg
85 Central Street
Email: HScholes@malanscholes.co.za
LBolz@malanscholes.co.za

AND TO:
NGCAMU INCORPORATED
SEVENTH RESPONDENT'S ATTORNEYS
Ground Floor, 229 Hoosen Haffejee Street, Pietermaritzburg 3201
P O Box 32, Pietermaritzburg 3200
Tel : 087 094 9284 Mobile : 083 439 8380 Fax : 086 210 5007
E-mail : info@ngcamulaw.co.za
Ref: Sifiso Khaya Ngcamu

AND TO AMICUS CURIAE:

DMS ATTORNEYS

3rd Floor, Sandton City Office Tower,Sandton City
Sandton, Johannesburg
E-mail: d.sibuyi@admsattorneys.co.za

AND AMICUS CURIAE:

CENTRE FOR ENVIRONMENTAL RIGHTS

2nd Floor Springtime Studios
1 Scott Road, Observatory
7925, Cape Town
Email: chorsfield@cer.org.za

THE CONSTITUTIONAL COURT

Case:

In the matter between:

GLOBAL ENVIRONMENTAL TRUST	First Applicant
MFOLOZI COMMUNITY ENVIRONMENTAL ORGANISATION	Second Applicant
and	
TENDELE COAL MINING (PTY) LTD	First Respondent
MINISTER OF MINERALS AND ENERGY	Second Respondent
MEC: DEPARTMENT OF ECONOMIC DEVELOPMENT, TOURISM AND ENVIRONMENTAL AFFAIRS	Third Respondent
MINISTER OF ENVIRONMENTAL AFFAIRS	Fourth Respondent
MTUBATUBA MUNICIPALITY	Fifth Respondent
HLABISA MUNICIPALITY	Sixth Respondent
INGONYAMA TRUST	Seventh Respondent
EZEMVELO KZN WILDLIFE	Eighth Respondent
AMAFA aKWAZULU-NATALI HERITAGE COUNCIL	Ninth Respondent
CENTRE FOR ENVIRONMENTAL RIGHTS	Amicus Curiae
MPUKONYONI TRADITIONAL COUNCIL	Amicus Curiae
MPUKONYONI COMMUNITY MINING FORUM	Amicus Curiae
THE ASSOCIATION OF MINE WORKERS AND CONSTRUCTION UNION	Amicus Curiae
THE NATIONAL UNION OF MINEWORKERS	Amicus Curiae

S.S.D.

TABLE OF CONTENTS

S.S.D.

FOUNDING AFFIDAVIT

I, the undersigned

SIFISO SENZO DLADLA

do make oath and say:

1. I am an adult living in Centurion and a trustee of the Global Environmental Trust, the first applicant. I am mandated by the Trust to depose to this affidavit.

2. The facts in this affidavit fall within my personal knowledge unless the contrary is stated or appears from the context. They are, to the best of my knowledge and belief, both true and correct.

3. When I make legal submissions, I do so on the advice of my legal representatives.

THE PARTIES

4. The first applicant is the Global Environmental Trust. The Trust works with local communities to enable them to participate meaningfully to promote environmentally and socially sound planning. The current Trustees are Sheila Berry, Sinegugu Zukulu, Lihle Mbokazi, and me.

S. S.D.

5. The second applicant is the Mfolozi Community Environmental Justice Organisation ("MCEJO"), a non-profit association that advances Mfolozi communities' rights to sustainable environmental development. MCEJO represents more than 3 900 members seeking environmental justice in Mpukonyoni.

6. Both the Trust and MCEJO act in the public interest and on behalf of MCEJO's members to vindicate the Constitutional right to ecologically sustainable development.

7. The first respondent is Tendele Coal Mining (Pty) Ltd ("Tendele"), a company registered and incorporated with limited liability according to the company laws of the Republic of South Africa. Tendele's head office is at the 1st Floor, 37 Peter Place, Bryanston, Gauteng.

8. The second respondent is the Minister of Minerals and Energy, the head of the Department of Minerals and Energy. The Minister's offices are at Building 2C of the Trevenna Campus at the corner of Meintjes & Francis Baard Street, Pretoria, Gauteng.

9. The third respondent is the Member of the Executive Council for KwaZulu-Natal (MEC) for Environmental Affairs. The MEC's offices are at the Department of Economic Development, Tourism and Environmental Affairs at 270 Jabu Ndlovu Street, Pietermaritzburg, KwaZulu-Natal.

S.S.D.

10. The fourth respondent is the Minister of Environmental Affairs, the head of Department of Environmental Affairs. The Minister's offices are at 473 Steve Biko Road, Pretoria, Gauteng.

11. The fifth respondent is Mtubatuba Municipality, a local municipality established in terms of the Local Government: Municipal Structures Act[1] which has its municipal offices at Mtubatuba, KwaZulu-Natal.

12. The sixth respondent is Hlabisa Municipality, a local municipality established in terms of the Structures Act, which has its municipal offices at Hlabisa, KwaZulu-Natal.

13. The seventh respondent is the Ingonyama Trust, a corporate body established in terms of Section 2 of the KwaZulu-Natal Ingonyama Trust Act[2] and which is administered by the KwaZulu-Natal Ingonyama Trust Board at its head office at San Souci, 65 Trelawney Road, Southgate, Pietermaritzburg, KwaZulu-Natal.

14. The eighth respondent is Ezemvelo KZN Wildlife. The KwaZulu-Natal Conservation Board established Ezemvelo as a juristic person in terms of the KwaZulu-Natal Nature Conservation Management Act.[3] Ezemvelo's offices are at 1 Peter Brown Drive, Montrose, KwaZulu-Natal.

---

[1] 117 of 1998.
[2] 33 of 1994.
[3] 9 of 1997.

S.S.D.

15. The ninth respondent is is Amafa aKwaZulu-Natali Heritage Council, a juristic person established in terms of section 5 of the KwaZulu-Natal Heritage Act[4] which has its offices at 195 Langalibalele Street, Pietermaritzburg, KwaZulu-Natal.

16. The second to ninth respondents did not participate in the litigation below.

17. The first amicus curiae in the Supreme Court of Appeal was the Centre for Environmental Rights, a non-profit organisation dedicated solely to the advancement of environmental rights as guaranteed in the South African Constitution.

18. The second to fifth amici curiae in the Supreme Court of Appeal were Mpukunyoni Traditional Council, Mpukunyoni Community Mining Forum, Association of Mineworkers and Construction Union (AMCU), and National Union of Mine Workers (NUM). I mention them jointly as they applied together, were represented by the same firm of attorneys, and made the same arguments.

19. I will ensure that all the amici below receive copies of this application.

THE CONSTITUTIONAL ISSUES IN THE MATTER

20. Before the Supreme Court of Appeal (SCA) the debate was about a proper interpretation of a number of statutory instruments enacted to give effect to the right contained in section 24 of the Constitution that guarantees everyone the right to an environment that is not harmful to their health or wellbeing and that is

[4] 4 of 2008.

S.S.D

protected for the benefit of present and future generations. The application before the High Court was brought explicitly in terms of sections 24 and 38 of the Constitution.

21. The dispute was about what obligations, on a proper interpretation of the relevant statutory instruments, fall on the first respondent ("**Tendele**") in respect of its mining operations at its Somkhele Mine in the Mtubatuba municipality, in KwaZulu-Natal. The applicants' case is that Tendele has failed to obtain a number of authorisations, required for it to lawfully conduct its mining operations, in terms of the following statutory instruments:

    21.1 The National Environmental Management Act 107 of 1998 ("**NEMA**");

    21.2 National Environmental Management: Waste Act 59 of 2008 ("**Waste Act**");

    21.3 KwaZulu Natal Planning and Development Act 6 of 2008 ("**KZN Planning Act**");

    21.4 Spatial Planning and Land Use Management Act 16 of 2013 ("**SPLUMA**");

    21.5 Mtubatuba Local Municipality Spatial Planning and Land Use Management By Law, January 2017 ("**Mtubatuba SPLUMA By Law**")

    21.6 KwaZulu Natal Heritage Act 4 of 2008 ("**KZN Heritage Act**").

22. To explain, Tendele holds three mining rights in terms of the Mineral and Petroleum Resources Development Act 28 of 2002 ("**MPRDA**") and has had

S.S.D

environment management plans ("**EMPs**") approved under that Act for those mining rights.

23. A central dispute between the applicants and Tendele revolved around the proper interpretation of the MPRDA and NEMA. In short, the issue was whether the environmental impact of mining operations was exclusively dealt with under the MPRDA and the EMPs under that Act, or whether environmental authorisations issued under NEMA were also required before commencing mining operations.

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

25. On the facts, it was clear that Tendele has neither applied for nor been granted environmental authorisations under NEMA, but rather holds the view that its MRPDA EMPs are sufficient.

26. While the above was the main issue, there were further issues concerning whether at the time of the commencement of mining Tendele:

S.S.D.

26.1 Required municipal town planning approval for its land use;

26.2 Required a licence to conduct waste management activities; and

26.3 Had complied with the requirements for relocating various graves of the community located on the land on which it mined.

27. On the principal dispute, as well as each of the additional disputes, the High Court found in favour of Tendele. The SCA endorsed the decision of the High Court. As matters stand on the law on mining rights sought before December 2014, the environmental impacts of mining fell to be regulated by the MPRDA, exclusively. The applicants approach this Court to reverse the judgment of the SCA on this issue. They contend that the issues arising are purely constitutional in nature and that the SCA was wrong in dismissing the appeal.

28. It is so that the SCA held that on a proper interpretation of the pleadings, no case was made for Tendele to answer. This is disputed. The correct construction of pleadings in a constitutional matter also raises a constitutional issue or a matter of general public importance.

OVERVIEW

29. Over more than a decade, Tendele blasted open the pristine ancestral land of the Mpukonyoni community - which borders the Hluhluwe-iMfolozi Park – to scoop coal out from under them. This open-cast mining caused immense damage to the community and its natural environment, leaving hundreds of houses cracked, ancestral graves exhumed without licenses, the loss of access to grazing lands

S.S.D

and ploughing fields, the loss of livestock, the pollution of water, and an increase in psychological stress and respiratory illnesses. All of these issues have one common feature – Parliament intended to address them by passing NEMA.

30. The applicants demanded Tendele seek an environmental authorisation under the NEMA to ensure they are adequately regulated and mitigated.

31. Tendele's response? No environmental authorisation is required for mining rights sought before December 2014. Ever.

32. Faced with this intransigence, the applicants sought help from the courts. We applied for an interdict to stop Tendele from mining until it obtained environmental authorisation. The High Court sided with Tendele. After criticising the applicants' pleadings, it found that mining rights sought before December 2014 do not require environmental authorisations. 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*.

33. The applicants sought leave to appeal against this judgment. We cited the chilling effect of the costs order. We argued it was bad in law. We pointed out that it 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.'

S.S.D.

34. The majority of the Supreme Court of Appeal dismissed the appeal for pleading issues. They criticised the applicants for not enumerating which specific listed activities Tendele undertook that obliged it to seek an environmental authorisation. The majority did not answer whether environmental authorisations are required for mining.

35. However, the law right now is as pronounced by the High Court – that environmental authorisations are not required for mining rights applied for before December 2014. This finding is wrong and falls to be overturned by this Court.

36. Schippers JA was not persuaded by Tendele's quibbles about our pleadings. 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.

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

    36.2 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.

37. 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.

S. S.D

38. We seek the Constitutional Court's leave to appeal against the majority judgment of the Supreme Court of Appeal.

39. Most importantly, this Court must provide the finality the High Court accepted would be 'in the interests of justice'. Are environmental authorisations required for mining activities? Given the High Court's decision, they are not required in KwaZulu-Natal. This error leaves the Somkhele community suffering from Tendele's unlawful conduct. It also affects many other communities as well as KZN's natural environment.

40. The need for the Constitutional Court's intervention is heightened: in the Western Cape and Gauteng, no mining may occur without an environmental authorisation.

41. Tendele may suggest that leave to appeal should be refused because of their gripes over our pleadings. Quite the opposite. The SCA's judgment sets a wrong precedent that must be reversed.

42. Finally, this Court must correct the High Court's costs order and the chilling effect it has on constitutional litigation against mining companies.

43. In the rest of this affidavit, I:

    43.1 set out the background;

    43.2 explain this Court's jurisdiction;

    43.3 motivate for leave to appeal;

    43.4 explain the grounds of appeal; and

S.S.D.

43.5 conclude.

BACKGROUND

44. The Mpukunyoni community owns land in KwaZulu-Natal some 30 kilometres inland from Mtubatuba. The community's beautiful land borders the Hluhuwe-iMfolozi Park ("HiP"). The area once served as the royal hunting ground for King Shaka. In 1895 it was proclaimed as a nature reserve. It is the oldest proclaimed nature reserve in Africa. HiP is well known for its rhinoceros research and conversation programme begun by the late Dr Ian Player in the 1960s as well as its stunning wilderness area. The Park has many longstanding partnerships with neighbouring communities to promote community involvement in and benefit from on conservation and ecotourism.

45. The HiP wilderness area has played a crucial role in the development of Dr Ian Player's Wilderness Leadership School. The wilderness areas have been used since the 1950s to teach people about the importance of wilderness:

> *'Wilderness is the landscape, which contains only the plants and animals native to it. Where people are alone with the living earth. Where there is neither fixed nor mechanical artefact. Once this environment was everywhere, now only relics remain. Yet in these places are the original bonds between mankind and the earth. In these are the roots of all religion, history, art and science. In renewing*

S.S.D.

these links lies the enduring value of wilderness. Neither expediency nor immediate appetite can justify their final extinction. Therefore our policy shall be to determine what of the wilderness remains to have declared inviolable every possible remnant, and to safeguard them thereafter.[5]

46. The HiP is one of the few protected areas in KwaZulu-Natal which features the 'big five'. It also comprises a functioning ecosystem which protects diverse environmental and ecological contributors.

47. Impacts from activities outside the HiP disturb the functioning of the existing ecosystems and this, in turn, is likely to disturb and threaten biodiversity protection within HiP. Noise, dust, visual intrusion, pollution and vibration pose threats to biodiversity within HiP.

48. The Mpukunyoni community sits atop 'one of the largest resources of open-pit mineable anthracite reserves in South Africa.'

49. Open-pit mining is an intensely destructive process that involves extensive blasting and removal of earth and rock to reach the minerals below.

50. Tendele started mining in 2006 in terms of an old-order mining right. In 2007 and 2011 Tendele received mining rights under the MPRDA together with environmental management programme (EMP) approved by the Department of Mineral Resources in terms of the MPRDA.

51. Mining is only taking place in Area 1 and Area 2 and the extended Area of Area 2, Areas 8 and 9 named KwaQubuka and Luhlanga respectively.

[5] http://www.wildernesstrails.org.za/wilderness/what-is-wilderness accessed 15 June 2015.

S.S.D.

52. Tendele now holds three mining rights. These are:

52.1 The 2007 mining right (dated 22 June 2007) granted in terms of Section 23 of the Mineral and Petroleum Resources Development Act 28 of 2002 (MPRDA) for coal mining for 27 years until 21st June 2034 on Area 1 on Reserve No 3 (Somkele), No. 15822 measuring **660.5321 hectares**;

52.2 The 2011 converted mining right (dated 30 March 2011) converted in terms of Item 7 of Schedule II of the MPRDA for coal mining for 20 years up to 29th February 2031 for Areas 2 and 3 on Reserve No. 3 (Somkele) No. 15822, measuring **779.8719 hectares**;

52.3 The 2013 amendment of a mining right (dated 8th March 2013) converted in terms of Section 102 of the MPRDA for coal mining which added to the 2011 Right the areas of KwaQubuka and Luhlanga areas on Reserve No. 3 No 15822 measuring 706.0166 hectares. This extended Areas 2 and 3 to **1485.8885 hectares**; and

52.4 The 2016 mining right granted in terms of section 23 of the MPRDA for coal mining for 30 years until 25th October 2046, on One part of the Remainder of Reserve No. 3 No. 15822 in Extent **21 233.0525 hectares**.

53. Mining in terms of the 2016 mining right has not yet commenced.

54. Given the destruction faced by the community, we instructed our attorney to find out if Tendele's conduct violated its environmental authorisation. She wrote to the provincial Department of Economic Development, Tourism and Environmental

S.S.D.

Affairs to request a copy of Tendele's environmental authorisation. On 13 June 2017, the Department of Mineral Resources responded and advised that EMPs issued under the MPRDA are deemed to be EMPs under the NEMA. They also advised that any EAs issued to Tendele would be monitored by the Department of Mineral Resources going forward. The Department also advised our attorney to apply for 'what documents you require' under the Promotion of Access to Information Act.

55. Our attorney wrote back the next day. She denied that we needed to make our request under PAIA. She also made the following submission:

> *"5. Under NEMA, the holder of a mining right, further to the compilation and approval of an EMP or EMPR, had to apply for an environmental authorisation if the holder was conducting or involved in any of the activities listed in the Environmental Impact Assessment Regulations Listing Notices.*
>
> *6. Tendele Coal Mining should have made application in terms of one or more of the following:*
>
> *a. Environmental Impact Assessment (EIA) Regulations published under GN R 1183 of September 1997 of the previous Environment Conservation Act of 1989;*
>
> *b. EIA Regulations under GN R385 of 21 April 2006 under the National Environmental Management Act, 1998;*
>
> *c. EIA Regulations under GN R543 of 18 June 2010; or*

S.S.D.

d. EIA Regulations under GN R982 GN R983, GN R984 and GN R985 of 4 December 2014."

56. She requested "a copy of all environmental authorisations issued to Tendele Coal (Pty) Ltd, along with all supporting documentation such as Environmental Management Programmes, at your earliest convenience."

57. It is clear from the correspondence that the appellants lacked sufficient detail on Tendele's operations to enumerate which of Tendele's activities triggered specific listed activities set out in the relevant notices.

58. It was plainly open to Tendele to deny that it was engaged in any listed activities. It did no such thing.

59. Instead, Tendele denied that its activities were unlawful on the sole basis that the "Environmental Conservation Act 73 of 1989 (ECA) and National Environmental Management Act 107 of 1998 were not at the time deemed to be applicable to mining operations."

60. We approached the High Court to seek an interdict against Tendele's continued mining without an environmental authorisation.

The High Court

61. As the dispute was defined so clearly, we filed a brief founding affidavit alleging that Tendele's mining required an environmental authorisation. Tendele's answering affidavit was also brief. It argued that no authorisation was required

S.S.D.

because the NEMA does not apply to mining rights sought before 2014. Tendele never denied engaging in listed activities.

62. The High Court (per Seegobin J) dismissed the application with costs.

63. He did so for two reasons:

63.1 The first was that the applicants had failed to specify which listed activities Tendele was engaged in that required an environmental authorisation.

63.2 The second was that the NEMA does not apply to mining rights sought before 2014.

64. I attach the High Court judgment marked "**SD1**".

65. The High Court granted leave to appeal. I attach the leave to appeal judgment marked "**SD2**".

The Supreme Court of Appeal

66. The Supreme Court of Appeal dismissed the appeal in a judgment written by Ponnan JA. The decision turned solely on the applicants' failure to specify which listed activities obliged Tendele to obtain an environmental authorisation. The SCA majority did not decide whether the High Court was correct in its decision that the environmental impacts of mining fall to be dealt with through the MPRDA, not the NEMA. This means that the High Court judgment stands on that issue. It must therefore be corrected by this Court.

67. Schippers JA dissented. He would have upheld the appeal.

S.S.D.

68. I attach the Supreme Court of Appeal's judgment marked "**SD3**".

S.S.D.

JURISDICTION AND LEAVE TO APPEAL

69. In the following section we explain the Constitutional Court's jurisdiction and set out why the Court ought to grant leave to appeal.

Jurisdiction

70. This matter engages this Court's jurisdiction in two respects:

    70.1 it raises various constitutional issues; and

    70.2 it raises arguable points of law of general public importance, which ought to be considered by this Court.

71. I address each category in turn.

Constitutional issues

72. This matter raises at least three constitutional issues.

73. The first is whether an environmental authorisation under NEMA is required before for mining when mining rights were sought before December 2014.

74. The NEMA was enacted to give effect to the constitutional right to an environment that is not harmful to our health. On the High Court's interpretation, Parliament's effort to uphold this right does not apply to mining, one of the most environmentally destructive activities imaginable.

S.S.D.

75. Although the SCA majority did not explicitly endorse the High Court finding on this issue, it remains the law as it has not been overturned. It should have been overturned. This Court's jurisprudence holds that where constitutional matters arise, all the relevant issues must be decided – it was erroneous for the SCA not to decide the issue of the applicability of NEMA, and rest its finding purely on the pleadings.

76. The approach of the High Court significantly impairs MCEJO members constitutional rights to a healthy environment. It also leaves all communities in KwaZulu-Natal subject to mining with no NEMA safeguards.

77. The second constitutional issue is that the SCA's approach to pleadings in motion proceedings rendered the applicants' rights to have a clearly defined dispute adjudicated meaningless. This is a significant intrusion into the applicants' constitutional right to approach the courts that will affect future litigants.

78. The approach of the SCA to the pleadings impacts on the rights of the applicants to access to courts in terms of section 34 of the Constitution, particularly their right to have *"any dispute that can be resolved by the application of the law decided in a fair public hearing before a court or where appropriate another independent and impartial tribunal or forum."* The dispute on appeal, namely whether or not NEMA applied was simply never decided, on insubstantial grounds. The pleadings in the matter were clear. The facts were common cause. There was no basis not to entertain the dispute as to whether or not NEMA applies. This was the main finding

S.S.D.

of the High Court. It was also perfectly understood by Tendele. There was no prejudice at all suffered. As such, the approach of the SCA elided an important issue to the detriment of the applicants, whose dispute remained unresolved.

79. The third constitutional issue is the chilling effect that the High Court's costs order will have on litigation to vindicate constitutional rights against private companies. The Supreme Court of Appeal declined to reverse this order. It is important that the Constitutional Court sets clear precedent that *Biowatch* applies in this case and to future cases of this nature.

Arguable points of law of general public importance

80. Seven judgments have discussed whether an environmental authorisation is required for pre-2014 mining rights.

81. The High Court held that environmental authorisation is not required.

82. The majority judgment of the SCA did not answer the question.

83. The dissent would have held that environmental authorisation is required.

84. Two judgments of the Western Cape High Court agreed that environmental authorisation is required, with the decision of *Maccsand* ruling on this squarely. [6] A judgment of the Gauteng High Court also held that it is required.[7]

---

[6] *City of Cape Town v Maccsand (Pty) Ltd & Others* 2010 (6) SA 63 (WCC); *Mineral Sands Resources (Pty) Ltd v Magistrate for the District of Vredendal, Kroutz NO and Others* [2017] 2 All SA 599 (WCC) at para 8.

S.S.D

85. In *Maccsand*, the SCA and this Court considered this question and declined to answer it.

86. If the Court declines to answer the question at this opportunity, further confusion on this arguable point will continue to prevail until it is eventually forced to answer it.

Interests of justice

87. Once jurisdiction is established, whether to grant leave to appeal turns on what is in the interests of justice.

88. I submit that there are three particularly compelling reasons why it is in the interests of justice that this Court determine this matter.

89. First, the significance of this issue cannot be overstated. Parliament passed NEMA specifically to regulate environmental impacts such as Tendele's operations. In Gauteng and the Western Cape, it does just that.

90. Second, the issue in this case is crystal clear: either environmental authorisation is required or it is not. The issue needs resolution once and for all.

91. Third, the appeal has strong prospects of success. In the next section I explain why.

---

[7] *Mining and Environmental Justice Community Network of South Africa and Others v Minister of Environmental Affairs and Others* 2019 (5) SA 231 (GP) at para 4.11.

S.S.D.

GROUNDS OF APPEAL

92. The applicants raise four crisp grounds of appeal:

    92.1 Environmental authorisations are required for mining operations.

    92.2 Excessively onerous pleadings requirements undermine the constitutional rights to access to a sustainable environment and access to the courts.

    92.3 Tendele was obliged to seek further authorisations regarding graves, town planning, and waste management.

    92.4 The costs order against the applicants discourages constitutional litigation and must be reversed.

Environmental authorisations are required for mining

93. The central question in this dispute is whether an environmental authorisation in terms of section 24 of NEMA is necessary prior to the commencement of activities related to mining.

94. Tendele's defence was that 'it does not require environmental authorisations in terms of section 24 of NEMA because its operations are undertaken pursuant to valid mining rights and EMPs applied for prior to the legislative amendments in December 2014 which gave rise to the One Environmental System.'

95. If correct, this drastically undercuts the significance of our constitutional right to a healthy environment.

S.S.D.

96. It is not correct.

97. The plain text of the MPRDA and NEMA require an environmental authorisation prior to the commencement of mining that includes any listed activities as set out in the regulations promulgated under NEMA.

98. NEMA is the legislation enacted to give effect to the right in section 24 of the Constitution which seeks to protect the environment for everyone.[8]

99. Under NEMA, and the Environment Conservation Act[9] before it, environmental authorisations must be sought for any 'listed activities' set out in the relevant gazettes. Section 24F of NEMA provided that "[n]otwithstanding the provisions of any other Act, no person may commence an activity listed in terms of section 24 (2)(a) or (b) unless the competent authority has granted an environmental authorisation for the activity."

100. Prior to December 2014, 'mining' was not specifically a listed activity. However, mining operations always require undertaking many listed activities. In this case, for instance, Tendele must clear hundreds of hectares of indigenous vegetation to make way for its operations. It is conducting a 'development activity, including associated structures and infrastructure, where the total area of the developed area is, or is intended to be, 20 hectares or more.'

---

[8] *MEC for Agriculture, Conservation, Environment and Land Affairs v Sasol Oil (Pty) Ltd and Another* 2006 (5) SA 483 (SCA) para 15
[9] 73 of 1989.

S.S.D.

101. No section of the MPRDA purports to exclude NEMA's application to mining. On the plain text, an environmental authorisation is required.

102. This interpretation is strengthened because it best gives effect to the constitutional imperative to conserve the environment. Section 39(2) of the Constitution requires adopting the interpretation that "*better*" promotes the spirit, purport and objects of the Bill of Rights even if neither interpretation would render a provision unconstitutional.[10]

103. The preamble of NEMA makes clear that the Act seeks to promote section 24(a) of the Constitution's guarantee that "*everyone has the right to an environment that is not harmful to his or her health or well-being*". Section 2 sets out the principles that apply because of NEMA, with section 2(1)(a) stating that these principles

> *"apply alongside all other appropriate and relevant considerations, including the State's responsibility to respect, protect, promote and fulfil the social and economic rights in [the Bill of Rights]".*

104. In addition, section 2(1)(e) of NEMA requires that the principles should "guide the interpretation administration and implementation of this Act, and any other law concerned with the protection or management of the environment," which is a

[10] *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd and Another* 2009 (1) SA 337 (CC) at paras 46, 84 and 107.

S.S.D.

principle that this Court has stated is of particular importance.[11] Self-evidently the MPRDA is such a law.[12]

105. In this respect, section 2(4)(b) of NEMA sets out that

> *"environmental management must be integrated, acknowledging that all elements of the environment are linked and interrelated, and it must take 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."*

106. In interpreting the MPRDA, section 4 provides that any reasonable interpretation consistent with its objects (which includes giving effect to section 24 of the Constitution) must be preferred. An interpretation of the MPRDA that excludes the requirement to obtain NEMA environmental authorisations for listed activities, simply because those activities occur during mining, would conflict with both NEMA's requirement of an integrated environmental management approach and the MPRDA's objective of giving effect to section 24 of the Constitution.

107. As there is no indication that the MPRDA prevails over NEMA, it is plain that it does not.

108. The NEMA applies. The applicants must succeed.

---

[11] *MEC for Agriculture, Conservation, Environment and Land Affairs v Sasol Oil (Pty) Ltd and Another* 2006 (5) SA 483 (SCA) para 15

[12] The preamble affirms "the State's obligation to protect the environment for the benefit of present and future generations"; section 2(h) sets one of the MPRDA's objects as giving effect to section 24 of the Constitution.

S S.D.

The applicants' pleadings were sufficient

109. The second ground of appeal is that the Supreme Court of Appeal's decision wrongly non-suited the applicants because of our pleadings.

110. Before addressing its flaws, we note that this is no mere technical question. The judgment of the Supreme Court of Appeal is significant for all litigants: if they cannot fully particularise the activities of their opponent, motion proceedings are not an option. This will serve to non-suit many litigants unable to afford the resources or time required by actions proceedings. It incentivises powerful wrongdoers to hide behind vague denials.

111. Our pleadings were criticised by the Supreme Court of Appeal and the High Court for not specifically listing the listed activities we allege Tendele is undertaking.

112. But this was not the dispute between the parties. As set out in the correspondence above, the applicants' position was that Tendele was engaging in listed activities and therefore required an environmental authorisation. Tendele did not deny engaging in listed activities in correspondence. Indeed, Tendele studiously avoided stating it is not engaged in listed activities in its pleadings.

113. Tendele's position was that no environmental authorisation was required because the MPRDA governs the environmental impacts of mining.

114. This was the dispute.

S.S.D.

115. The applicants' pleadings set out this dispute and asked the Court to adjudicate it. No further particulars were required.

116. In any event, Tendele's failure to specifically deny engaging in listed activities precludes them from complaining about this issue. When facts are within the peculiar knowledge of a party, but not adequately canvassed on paper, a court will give such version no credence. In *Wightman v Headfour (Pty) Ltd,*[13] in respect of facts which the respondent is uniquely possessed and capable of providing, held:

> *"When the facts averred are such that the disputing party must necessarily possess knowledge of them and be able to provide an answer (or countervailing evidence) if they be not true or accurate but, instead of doing so, rests his case on a bare or ambiguous denial the court will generally have difficulty in finding that the test is satisfied. ... If that does not happen it should come as no surprise that the court takes a robust view of the matter."*

117. Manifestly, the extent of the mining activities undertaken was within the peculiar knowledge of Tendele. They should have set out in full the activities it was undertaking but failed to do so. The criticism against the applicants that their papers failed to particularise which activities were engaged upon by Tendele is not justified.

---

[13] 2008 (3) SA 371 (SCA) para 13.

S.S.D.

118. We also note Schippers JA accepted our argument that there was no genuine dispute over whether Tendele is conducting listed activities. Of course Tendele is.

119. Given the scale of the operation, the correct inference to draw is reflected in the dictum of Rogers J that *"a company intending to embark on mining would typically have had to perform activities which were listed activities."*[14]

120. Tendele's mining of 'one of the largest resources of open-pit mineable anthracite reserves in South Africa' leads to an inescapable inference that it conducts listed activities.

121. This inference is justified here.

Further issues

122. There were further illegalities with the conduct of Tendele, which were decided against the applicants by the High Court, and the SCA has endorsed some of those findings. I set these out and explain why the findings are erroneous.

Land Use

123. The High Court found that Tendele is not mining in contravention of the KZN Planning Act or SPLUMA.

124. The KZN Planning Act commenced on 1 May 2010. In respect of already existing mining operations at the time of commencement, it applies where there is "*a*

[14] *Mineral Sands Resources (Pty) Ltd v Magistrate for the District of Vredendal, Kroutz NO and Others* [2017] 2 All SA 599 (WCC) at para 8.

S.S.D.

material change" to the existing use of any building or land without subdivision. The High Court found that because Tendele's operations commenced before 2010 there is no 'development' in need of approval.

125. SPLUMA commenced on 01 July 2015. Section 26(3) read with Schedule 2 of SPLUMA provides for the lawful continuation of existing land uses that would otherwise be prohibited. The High Court held that because Tendele's operations 'pre-dated the commencement of SPLUMA and were lawful at the time that SPLUMA commenced', no SPLUMA approval is necessary as the operations were an existing land use.

126. This may be so for the mining rights that became operative prior to 2010 in relation to the KZN Planning Act or 2015 for SPLUMA as the shielding of existing conduct from new laws is an understandable safeguard against retrospectivity. But this does not apply to new mining conducted under mining rights granted after the commencement of the KZN Planning Act and SPLUMA.

127. The mining right granted in 2016, which covers "Areas 4 and 5", clearly post-dates the KZN Planning Act. Tendele has not yet commenced any mining operations in respect of "Areas 4 and 5". The mining right covers an area of over 21 233 hectares – more than 200 square kilometres. This is an area nearly ten times larger than the other mining rights combined.

128. In regard to the land covered by Areas 4 and 5, no mining has commenced and so the use of that land to commence mining would be to convert that land to a new

S.S.D.

purpose by "making use of its resources". It is therefore submitted that this amounts to "development" under section 38 of the KZN Planning Act.

129. In addition, the sheer extent of the portion of land on which these activities will commence would amount to a "material change" for purposes of the KZN Planning Act requiring appropriate approval.

130. As for the High Court finding that Tendele's activities do not fall under "development" as defined in the Mtubatuba SPLUMA By Laws of January 2017, the same argument set out above applies. Section 46(f) of the By Laws provides that municipal approval is required for "the development of land that is situated outside the area of a land use scheme, if the development constitutes an activity contemplated in Schedule 3". Schedule 3 provides that "mining operations" is such an activity and item 2 defines "mining operations", in part, as including the processing of a mineral where a mining right has been granted "but processing has not commenced by 10 October 2008."

131. In respect of Areas 4 and 5, the mining right has been granted, but on Tendele's own version processing of the mineral itself has not commenced. As a result, such conduct would clearly amount to development requiring approval under the By Laws, which approval Tendele does not have.

132. The SCA also held that "two of the relevant local municipalities have confirmed that no planning approval or land use approval is required for the continuation of mining operations by Tendele." This finding is erroneous as it elevates the views of the municipality and renders them determinative of the legal position.

S.S.D.

Waste Management

133. The National Environmental Management: Waste Act[15], read with the listing notice of 2013, requires that any person engaged in a listed "waste management activity" must have a licence. Tendele denied *in toto* that it was engaged in any waste management activities. In the alternative, Tendele argued that insofar as it was conducting any waste management activities that required a licence due to being listed, regulation 7(1) excused it from such licencing requirement until such time as the relevant Minister called upon it to apply.

134. The SCA endorsed this view, holding that "Tendele was therefore entitled to continue conducting such activity, until called upon by the Minister to apply for a waste management licence. The Minister has not called upon Tendele to do so."[16]

135. The SCA's views that there was no evidence of identified waste management activity seems to fly against against logic: a venture the size of that undertaken by Tendele to open-cast mine anthracite must generate listed waste products.

136. The SCA's finding that the Minister had not called upon Tendele to do anything constitutes abdication of judicial function. The Court incorrectly appears to have ascribed to the Minister the power to determine the legality of Tendele's conduct and, more incorrectly, merely through the Minister's own lack of conduct.

---

[15] 59 of 2008.
[16] At para 121.

S.S.D.

137. Such a finding undermines the judicial function which places the determination of the legality of conduct squarely in the jurisdiction of the courts.

138. There can be no argument that Tendele is engaging in conduct which is listed and therefore requires a licence. The purpose of the transitional provisions is to allow reasonable time for the regularisation of previously lawful conduct that would otherwise have been immediately rendered unlawful upon the publication of the listing notice. Such transitional provisions cannot have the effect of permanently immunising that conduct, especially where this occurs solely due to the inaction of the relevant Minister. Regulation 7(1) obliges the Minister to call upon "such a person" to apply for a licence – it does not impose a discretion on the Minister to decide whether or not such person should be called upon.

Relocation of Graves

139. The High Court dealt with the issue at paragraph 91. In that paragraph it was noted that Tendele had accepted in the answering affidavit that it had altered and removed traditional graves without being in possession of authorizations from the ninth respondent ("**Heritage Council**"). The SCA also accepted that the graves had been unlawfully relocated.

140. In the light of this, the High Court declined to take into consideration the previous unlawful conduct in the relocation of graves without the necessary authorisation. The same approach was followed by the SCA, which criticised the applicants for seeking an interdict on the basis that an interdict is a future looking remedy.

S.S.D.

141. Whether or not the relocation of graves is lawful cannot be decided by reference to the view taken by the Heritage Council. It is to be decided by reference to the Act. Before any grave may be damaged, altered, exhumed or removed under section 35 of the KZN Heritage Act, the prior written consent must be obtained from the Heritage Council. However, the Heritage Council must be satisfied that the applicant has made concerted efforts to engage the relevant communities affected, and that those communities agree to the conduct in question.

142. It is clear that no written approval has been provided by the Heritage Council, and so whether it is "satisfied" or not with Tendele's conduct is irrelevant – the jurisdictional requirement of obtaining prior written permission has not been met. As for the satisfaction of the Heritage Council, this must be construed as "satisfied on reasonable grounds"[17] and only the Heritage Council itself could place before the Court the relevant evidence that it was satisfied and that its satisfaction was based on reasonable grounds, but it did not.

143. The relocation of graves was equally unlawful.

144. If the applicants were not entitled to an interdict, they were at least entitled to a declaration of unlawfulness, which was not granted.

Costs

145. The application was brought before the High Court on behalf of an NPO, members of MCEJO and the local community, as well as in the public interest. The

[17] *Walele v City of Cape Town and Others* 2008 (6) SA 129 (CC) para 60

S. S. D.

application sought to vindicate section 24 environmental rights. As such, the applicants relied on the principle established by the Constitutional Court in Biowatch that, even to the extent the applicants may be unsuccessful in their application, they should not be ordered to pay costs. Yet, the High Court ordered costs against the applicants and the majority judgment in the SCA failed to overrule this.

146. Tendele has since abandoned the costs order. However, a notice of abandonment does not overturn the judgment of the court a quo, which remains on the public record and is available to persons researching or seeking a direction on costs in an environmental law dispute. There is no public record that the costs order was abandoned.

147. Schippers JA noted that founding papers were clear that the appellants were seeking to enforce the right to have the environment protected, contained in section 24 of the Constitution, as well as the provisions of NEMA and various other environmental management statutes. He also noted that the application for the interdict was brought in the public interest, the interests of the people residing in the vicinity of the mine affected by mining operations and in the interests of the appellants' members, as envisaged in section 38 of the Constitution.

148. Schippers JA therefore acknowledged that the order directing the appellants to pay Tendele's costs is not one that could reasonably have been made.

149. The costs order must be set aside.

S.S.D.

150. The prospects of success are strong.

CONCLUSION

151. Mining has not yet commenced in terms of the 2016 mining right in Areas 4 and 5 – an area in excess of 222 square kilometres. Nor has mining commenced in Area 3 which is situated on the fence line of the HiP Wilderness Area.

152. Mining operations are currently taking place in Area 1, 2, 8 and 9.

153. For the reasons set out above, I ask for the relief set out in my attached notice of application.

SIFISO SENZO DLADLA

I hereby certify that the deponent knows and understands the contents of this affidavit and that it is to the best of his knowledge both true and correct. This affidavit was signed and sworn to before me at Johannesburg on this the 02 day of March **2021.**

7206812-3
CST
Magopane

COMMISSIONER OF OATHS
NAME: Modiegi Magopane
ADDRESS: 15 Sturdee Avenue
DESIGNATION: Const

SOUTH AFRICAN POLICE SERVICE
CLIENT SERVICE CENTRE
21-03-02
CSC
ROSEBANK
SUID-AFRIKAANSE POLISIEDIENS

Copy
"SD1"

REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG

CASE NO: 11488/17P

In the matter between:

GLOBAL ENVIRONMENTAL TRUST	First Applicant
MFOLOZI COMMUNITY ENVIRONMENTAL JUSTICE ORGANISATION	Second Applicant
SABELO DUMISANI DLADLA	Third Applicant
and	
TENDELE COAL MINING (PTY) LTD	First Respondent
MINISTER OF MINERALS AND ENERGY	Second Respondent
MEC: DEPARTMENT OF ECONOMIC DEVELOPMENT, TOURISM AND ENVIRONMENTAL AFFAIRS	Third Respondent
MINISTER OF ENVIRONMENTAL AFFAIRS	Fourth Respondent
MTUBATUBA MUNICIPALITY	Fifth Respondent
HLABISA MUNICIPALITY	Sixth Respondent
INGONYAMA TRUST	Seventh Respondent
EZEMVELO KZN WILDLIFE	Eighth Respondent
AMAFA AKWAZULU-NATALI HERITAGE COUNCIL	Ninth Respondent

S.S.D

ORDER

The application is dismissed with costs, such costs are to be paid by the applicants jointly and severally and are to include the costs of two (2) Counsel.

JUDGMENT

Seegobin J

Introduction

[1] This is an application for an interdict. The matter was fully argued before me on 24 August 2018. In the course of preparing this judgment, judgment in the matter of *Maledu and others v Itereleng Bakgatla Mineral Resources (Pty) Ltd and another*[1] was handed down by the Constitutional court on 25 October 2018. That case dealt primarily with two competing rights in the context of evictions: the first was the right of the applicants to occupy and enjoy the farm which they and their predecessors-in-title had occupied for nearly a century; and the second was the right of the respondents (the respective mining companies) to mine on the farm occupied by the applicants. The case thus concerned a dispute between occupiers of land on the one hand and entities that were granted mining rights to mine platinum group metals under the Mineral and Petroleum Resources Development Act 28 of 2002 (MPRDA) on the self-same land on the other.

[2] In light of the findings made in *Maledu* counsel in the present matter were duly afforded an opportunity to make further written submissions, if they so wished, on whether such findings have a material bearing on the issues that call for determination in the present matter. Taking up this offer counsel for the applicants

[1] [2018] ZACC 41.

S.S.D.

Mr *Dickson* SC (assisted by Ms *Mazibuko*) delivered further written submissions on 30 October 2018 and by agreement counsel for the respondents, Mr *Lazarus* SC (assisted by Mr *Ferreira*) did likewise on 2 November 2018. I am indebted to counsel in this regard. I will deal with these further submissions and the findings in *Maledu* later in this judgment.

Present matter

[3] This case concerns the Somkhele Mine (Somkhele) which carries on mining operations adjacent to the Hluhluwe-Imfolozi Park in northern KwaZulu-Natal. Somkhele is one of the largest resources of open-pit mineable anthracite in the country and is the principal supplier of anthracite to the ferrochrome industry in the Republic. The ferrochrome industry on its own provides employment for about 20 000 people in this country.

The parties

[4] This application is brought by 3 applicants: the first is Global Environmental Trust, a registered trust which has the general object of pursuing and supporting environmental causes and has the power to bring legal proceedings to advance its objects; the second is the Mfolozi Community Environmental Justice Organisation whose main object is to protect the rights of the members of the association who are members of the communities affected by open-cast mining in the area where they reside. The second applicant boasts a membership of 530 residents. The third is Sabelo Dumisani Dladla, an adult male student who resides in an area known as Nkolokotho which is near the site of the mining being conducted by the first respondent at Somkhele. Mr Dladla is the main deponent to the applicants' founding papers.

[5] The application is brought in terms of s 24 of the Constitution of 1996[2] and also in terms of one or more of the provisions of s 38 of the Constitution,[3] either in the public interest or as an affected party.

---

[2] Constitution of the Republic of South Africa 1996, s 24 of which reads as follows:
Environment – 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-

S.S.D.

[6] Nine respondents have been cited: the first and perhaps the most important being Tendele Coal Mining (Pty) Ltd which will be referred to simply as 'Tendele'. It is Tendele that conducts mining operations in the area of Somkhele. Tendele opposes the granting of any relief against it as set out further on in the judgment. (see para 12 *infra*)

[7] The eight other respondents (in the order in which they have been cited) are the Minister of Minerals and Energy (second respondent), the MEC: Department of Economic Development, Tourism and Environmental Affairs (third respondent), the Minister of Environmental Affairs (fourth respondent), the Mtubatuba Municipality (fifth respondent), the Hlabisa Municipality (sixth respondent), the Ingonyama Trust (seventh respondent), Ezemvelo KZN Wildlife (eighth respondent) and lastly Amafa aKwaZulu-Natali Heritage Council (ninth respondent). Apart from the second respondent indicating that he will abide the decision of this court, none of the other respondents have shown any interest in the matter.

Amici curiae

[8] In the course of these proceedings four other parties applied jointly for consent to be admitted as *amici curiae* in terms of rule 16A(2) of the Uniform Rules. Neither the applicants nor Tendele raised any real objections to the application and the *amici* were duly admitted. They comprise the following: The Mpukunyoni Traditional Council and Mpukunyoni Traditional Authority (MTC), the 30 Izinduna of the 30 Isigdodi in the Mpukunyoni Area (Mpukunyoni Izinduna), Mpukunyoni Community Mining Forum (MCMF), the Association of Mineworkers and

---

(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.

[3] Section 38 reads as follows:
Enforcement of rights – Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are-
(a) anyone acting in their own interest;
(b) anyone acting on behalf of another person who cannot act in their own name;
(c) anyone acting as a member of, or in the interest of, a group or class of persons;
(d) anyone acting in the public interest; and
(e) an association acting in the interest of its members.

S.S.D

Construction Union (AMCU) and the National Union of Mine Workers. At the opposed hearing on 24 August 2018 the *amici* were represented by *Mr D Sibiyi*.

[9] The positions occupied by the respective *amici* in relation to the applicants on the one side and Tendele on the other are as follows: the MTC has a substantial interest in the mining activities of Tendele since Tendele is one of the biggest employers of community members of the Mpukunyoni area. The Mpukunyoni Izinduna are by extension the arm of the MTC and stand in an immediate contact position with the Mpukunyoni community members who are employees and/or potential employees of Tendele. The MCMF operates as a liaison between the Tendele management and the Mpukunyoni community at large regarding the operations of Tendele. AMCU and the National Union of Mine Workers represent the employees of Tendele, whose interests would be adversely affected if the mine was closed.

[10] In the main the case made out by the *amici* was that the closure of the mine would have a deleterious effect not only on the people who work there but also on the community at large. They contended that even if the mine were to shut down for a short period the negative consequences of the damage and loss of infrastructure may be difficult to reverse. The Mpukunyoni community in particular would stand to lose the current good state and condition of the infrastructure provided by Tendele which would be dilapidated and costly to rehabilitate should the mine close.

[11] The position adopted by the *amici* is in many ways very similar to that of Tendele as far as the interests of its employees and the broader interests of the community are concerned. They highlighted the beneficial effects that mining has had in the area as it is one of the main sources of income for many households within the Mpukunyoni community. The majority of households in the area are entirely dependent on the continued existence of the mining operations for their livelihood.

Relief sought

[12] The applicants seek an interdict to shut the mine down completely. They argue that the mine is operating illegally and in contravention of various pieces of

S.S.D.

legislation. The full extent of the relief claimed in the amended notice of motion is the following:

"1. THAT First Respondent be and is hereby interdicted and restrained from carrying on any mining operations at the following sites: -

1.1 Area 1 on Reserve No. 3 (Somkhele) No 15822 measuring 660.5321 hectares as described in the Mining Right dated 22nd June 2007;
and/or

1.2 Areas 2 and 3 on Reserve No. 3 (Somkhele) No. 15822 measuring 779.8719 hectares as described in the Mining Right date 30th March 2011;
and/or

1.3 Areas of KwaQubuka and Luhlanga areas on Reserve No. 3 No. 15822 measuring 706.0166 hectares as described in the Amendment of a Mining Right dated 8th March 2013;
and/or

1.4 One part of the Remainder of Reserve No. 3 No. 15822 in extent 21233.0525 hectares described in the Mining Right dated 26th October 2016;

Until further order of this Honourable Court.

2. THAT First Respondent pay the costs of this application together jointly and severally, with any other Respondent who opposes this application.

3. THAT Applicants be granted further and/or alternative relief."
(my emphasis)

Nature of the relief claimed

[13] There was some disagreement on the papers between the applicants and Tendele as to whether the interdict they seek is final or interim. It seems that the relief originally sought in the notice of motion was for a final interdict that would have restrained Tendele from conducting any mining operations at Somkhele. In the replying affidavit the applicants denied that the relief they seek is final. They foreshadowed an amendment to the notice of motion that will clarify the position. They averred that they "do not seek a final interdict to prevent Tendele from mining

S.S.D.

at Somkhele but an interdict to prevent the mining from taking place illegally or contrary to the requirements of the law."

[14] In paragraph 2 of their heads of argument and in oral submissions counsel for the applicants again characterised the relief as being interim in nature. They submitted that "the interdict being sought by applicants is semi-temporary in that it is sought until further order of this Honourable Court" (this is in line with the wording now appearing in the amended notice of motion). In paragraph 5.2 of their heads of argument they say that they seek

> "an interdict to prevent Tendele from conducting itself illegally pending compliance and a return to the High Court. In other words an interdict until Tendele satisfies the court that it is compliant. This is temporary in nature and effect. These are referred to as 'structural interdicts'."

[15] At the outset I make the following preliminary observations concerning the manner in which the relief has been framed. Having regard to counsels' submissions as set out above, it seems to me that the applicants are not entirely sure as to precisely what relief they seek. I say this for the following reasons:

15.1 By definition an interim interdict is

> "a court order preserving or restoring the *status quo* pending the final determination of the rights of the parties. It does not involve a final determination of these rights and does not affect their final determination."[4]

15.2 The legal requirements for an interim interdict are well-established.[5] The following statement of the requirements by Corbett J (as he then was)[6] is representative of what has become the almost standard formulation of the requirements:[7]

> "Briefly [stated] these requisites are that the applicant for such temporary relief must show –

---

[4] *National Gambling Board v Premier, KwaZulu-Natal and others* 2002 (2) SA 715 (CC) para 49, quoting LTC Harms in Joubert (ed) *The Law of South Africa* 1st re-issue vol 11 para 314.
[5] *Setlogelo v Setlogelo* 1914 AD 221.
[6] In *L F Boshoff Investments (Pty) Ltd v Cape Town Municipality; Cape Town Municiaplity v L F Boshoff Investments (Pty) LTd* 1969 (2) SA 256 (C) at 267A-F.
[7] Prest *The Law and Practice of Interdicts* at 50 – 51.

S.S.D.

(a) that the right which is the subject-matter of the main action and which he seeks to protect by means of interim relief is clear or, if not clear, is *prima facie* established, though open to some doubt;

(b) that, if the right is only *prima facie* established, there is a well-grounded apprehension of irreparable harm to the applicant if the interim relief is not granted and he ultimately succeeds in establishing his right;

(c) that the balance of convenience favours the granting of interim relief; and

(d) that the applicant has no other satisfactory remedy."

15.3 In *Maledu, supra*, the Constitutional Court, with reference to the applicable legal framework relevant to the issues in that matter found it necessary to investigate whether the MPRDA provided for an alternative avenue of relief that should have been first exhausted before the respondents were entitled to approach the court for relief in the form of an eviction and an interdict. In this regard the Constitutional Court said the following:

> "[8] .... In the main, this will entail investigating whether the MPRDA creates an alternative avenue for relief that must be exhausted before the respondents could approach a court for eviction and an interdict as they did. This is in line with the well-entrenched rule of our law that an application for an interdict cannot succeed if the requirements set out in *Setlogelo* are not met. The requirements include, among others, "the absence of any other satisfactory remedy" (footnotes omitted, my emphasis).

15.4 A structural interdict on the other hand is one in which the violator is instructed to take steps to comply with its constitutional obligations and then report back to the court on the extent to which it has complied with the court's order. It thus involves the continued participation of the court in the implementation of its orders. The circumstances in which a court will consider making such an order and the pre-requisites for such an order are aptly summarised by Lowe J in *Kenton-On-Sea Ratepayers v Ndlambe Municipality*[8] as follows:

[8] 2017 SA 86 (ECG) paras 97 – 101.

S.S.D.

"[97] The Constitutional Court has shown itself willing to grant structural interdicts in appropriate circumstances. In *Hoërskool Ermelo and Another v Head, Department of Education, Mpumalanga, and Others* 2009 (3) SA 422 (SCA), the court stated that a remedy in the form of a structural interdict or supervisory order may be very useful. This is because, the court stated further, it advances constitutional justice by ensuring that the parties themselves become part of the solution.

[98] A structural interdict consists of five elements. First, the court declares the respects in which the violator's conduct falls short of its constitutional obligations; second, the court orders the violator to comply with its constitutional obligations; third, the court orders the violator to produce a report within a specified period of time setting out the steps it has taken; fourth, the applicant is afforded an opportunity to respond to the report; and finally, the matter is enrolled for a hearing and, if satisfactory, the report is made an order of court. (See *Dawood and Another v Minister of Home Affairs and Others; Shalabi and Another v Minister of Home Affairs and Others; Thomas and Another v Minister of Home Affairs and Others* 2000 (3) SA 936 (CC) (2000 (8) BCLR 837; [2000] ZACC 8) paras 67 – 70; *Minister of Health v Treatment Action Campaign (No 2)* 2002 (5) SA 721 (CC) (2002 (10) BCLR 1033; [2002] ZACC 15) paras 101 – 114 and 124 – 133; *Pheko and Others v Ekurhuleni Metropolitan Municipality* 2012 (2) SA 598 (CC) (2012 (4) BCLR 388; [2011] ZACC 34) para 50; *Head of Department, Mpumalanga Department of Education and Another v Hoërskool Ermelo and Another* 2010 (2) SA 415 (CC) (2010 (3) BCLR 177; [2009] ZACC 32) para 97.)

[99] And in 10(1) *Lawsa* the following appears: A court —

> '(m)ay grant appropriate relief, including a declaration of rights, when a right in the Bill of Rights has been breached. This relief is typically invoked when government policy is inconsistent with the Constitution. Structural interdicts are particularly suited to remedying systemic failures or inadequate compliance with constitutional duties. The purpose of a structural interdict is to compel an organ of state to perform its constitutional duties and to report from time to time on its progress in so doing. This order involves requiring an organ of state to revise an existing policy and to submit the revised policy to the court to enable the court to satisfy itself that the policy is consistent with the Constitution.'

S.S.D

[100] In *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC) (1997 (7) BCLR 851; [1997] ZACC 6) para 100, Kriegler J stated:

> 'There is no reason, at the outset, to imagine that any remedy is excluded. Provided the remedy serves to vindicate the Constitution and deter its future infringement, it may be appropriate relief . . . .'

[101] The Constitutional Court (para 19, Ackermann J) held that:

> 'Appropriate relief will in essence be relief that is required to protect and enforce the Constitution. Depending on the circumstances of each particular case the relief may be a declaration of rights, an interdict, a *mandamus* or such other relief as may be required to ensure that the rights enshrined in the Constitution are protected and enforced. If it is necessary to do so, the courts may even have to fashion new remedies to secure the protection and enforcement of these all-important rights.'"

15.5 Structural interdicts are ordinarily only appropriate in cases where it is necessary to secure compliance with a court order. The Constitutional Court[9] has held that (footnotes omitted):

> "The order made by the High Court included a structural interdict requiring the appellants to revise their policy and to submit the revised policy to the Court to enable it to satisfy itself that the policy was consistent with the Constitution. In *Pretoria City Council* this Court recognised that Courts have such powers. In appropriate cases they should exercise such a power if it is necessary to secure compliance with a court order. That may be because of a failure to heed declaratory orders or other relief granted by a Court in a particular case. We do not consider, however, that orders should be made in those terms unless this is necessary. The government has always respected and executed orders of this Court. There is no reason to believe that it will not do so in the present case."

15.6 In the *Treatment Action Campaign* matter, *supra*, the Constitutional Court, after conducting an examination of the jurisprudence in foreign jurisdictions on the question of remedies found "that courts in other countries also accept that it may be appropriate, depending on the circumstances of the

[9] *Minister of Health and others v Treatment Action Campaign and others (No. 2)* 2002 (5) SA 721 (CC) para 129.

S.S.D.

particular case, to issue injunctive relief against the State ..." (para 107). In paragraph 112 of the judgment the court went on to say the following:

> "[112] What this brief survey makes clear is that in none of the jurisdictions surveyed is there any suggestion that the granting of injunctive relief breaches the separation of powers. The various courts adopt different attitudes to when such remedies should be granted, but all accept that within the separation of powers they have the power to make use of such remedies – particularly when the State's obligations are not performed diligently and without delay."

15.7 Following from the above the SCA[10] has characterised the relief as "*an order where the court exercises some form of supervisory jurisdiction over the relevant organ of state.*"

15.8 From the authorities it thus appears that structural interdicts are virtually always sought and/or granted against organs of state.

[16] In light of the principles set out above it is left to be seen whether the applicants have made out a proper case for the relief sought or for some other relief that would be appropriate in the circumstances.

Applicants' complaints

[17] The applicants complain that Tendele's current mining operations are unlawful because Tendele (a) has no environmental authorisation issued in terms of section 24 of the National Environmental Management Act 107 of 1998 (NEMA); (b) has no land use authority, approval or permission from any municipality having jurisdiction; (c) has no waste management licence issued by the Minister of Environmental Affairs in terms of section 43 of the National Environmental Management: Waste Act 59 of 2008 (Waste Act) and (d) has no written approval in terms of section 35 of the KwaZulu-Natal Heritage Act 4 of 2008 (the KZN Heritage Act) to damage, alter, exhume or remove any traditional graves from their original position.

---

[10] *Modderfontein Squatters, Greater Benoni City Council v Modderklop Boerdery (Pty) Ltd (Agri SA and Legal Resources Center, Amici Curiae); President of the Republic of South Africa and others v Modderklop Boerdery (Pty) Ltd (Agri SA and Legal Resources Centre, Amici Curiae)* 2004 (6) SA 40 (SCA) at para 39.

S. S. D.

Issues that require determination

[18] The following broad issues arise:

18.1 Whether Tendele was required to obtain environmental authorisation as contemplated in section 24 of NEMA prior to commencing with operations and if so, whether statute permits the continuation of mining operations pending compliance with legislation.

18.2 Whether an Environmental Management Programme (EMP) obtained under the MPRDA prior to the legislative amendments in December 2014 which gave rise to the One Environmental System entitles Tendele to continue its pre-existing mining operations.

18.3 Whether the provisions of the KwaZulu-Natal Planning and Development Act 6 of 2008 (KwaZulu-Natal PDA)), the Special Planning and Land Use Management Act 16 of 2013 (SPLUMA) and the provisions of the Mtubatuba SPLUMA Bylaws of January 2017 are applicable to Tendele, and if so:

18.3.1 Whether Tendele submitted a land use application to the fifth and/or sixth respondent and whether it received the requisite authority to use and develop the property as contemplated in the KwaZulu-Natal PDA;

18.3.2 Whether Tendele has complied with the provisions of SPLUMA, particularly s 26 read with Schedule 2;

18.3.3 Whether Tendele has complied with the provisions of the SP LUMA Bylaws of the fifth respondent;

18.3.4 Whether the provisions of the KZN Heritage Act are applicable to Tendele and if so, whether Tendele has complied therewith, especially s 35 thereof.

S. S.D.

18.3.5 Whether Tendele requires a waste management licence for any of its mining activities as required by the National Environment Management: Waste Act 59 of 2008 and more specifically sections 19 and 20 read with Schedule 3 thereof.

18.3.6 Whether the interdict sought is interim or final.

18.3.7 Whether, if the court finds that the applicants have established the requirements of either an interim or final interdict, it would be just and equitable for the court to suspend the operation of any interdict in order to allow Tendele the opportunity to apply for the necessary statutory approvals to continue its mining operations.

Legislative content

[19] The legislative instruments relevant to this application are:

- the National Environmental Management Act 107 of 1998,
- the Mineral and Petroleum Resources Development Act 28 of 2002,
- National Environmental Management Laws Amendment Act 25 of 2014,
- National Environment Management Act Regulations, GN R10328, *GG* 38282, 4 December 2014,
- KwaZulu-Natal Planning and Development Act 6 of 2008,
- Spatial Planning and Land Use Management Act 16 of 2013,
- Mtubatuba SPLUMA Bylaws of January 2017, *Provincial Gazette* 1797, 9 March 2017,
- National Environmental Management: Waste Act 59 of 2008, and
- The KwaZulu-Natal Heritage Act 4 of 2008.

Summary of applicants' case

[20] The applicants contend that:

20.1 the environmental authorisations were a requirement necessitating compliance and that the subsequent amendments to NEMA and the MPRDA do not alter the pre-existing obligations for Tendele to obtain an environmental authorisation.

S.S.D.

20.2 the provisions of the KwaZulu-Natal PDA and SPLUMA and the fifth respondent's municipal bylaws are applicable to Tendele and more importantly prior to embarking on the mining activity Tendele was required to obtain the requisite land use authorisation from the fifth alternatively sixth respondent and has not done so.

20.3 the removal and/or altering of traditional graves could only have been embarked upon in terms of section 35 of the KwaZulu-Natal Heritage Act, however Tendele has not done so.

20.4 Tendele has failed to comply with the provisions of the Waste Act which are applicable to the activities conducted by Tendele at the Somkhele mine.

Summary of Tendele's case

[21] Tendele's case is that:

21.1 it does not require environmental authorisations in terms of s 24 of NEMA because its operations are undertaken pursuant to valid mining rights and EMP's granted and approved by the Department of Mineral Resources (DMR) prior to the legislative amendments in December 2014 which gave rise to the One Environmental System.

21.2 its mining operations pre-date the introduction of mining as a land use requiring municipal approval and the introduction of the relevant legislation provides for the continuation of lawful, historical mining operations such as those undertaken by it and that, in any event, it has obtained municipal approval for its mining operations.

21.3 while it accepts that it has previously removed or altered traditional graves without being in possession of the necessary authorisation, there is no risk that it will in future conduct any such removal or alteration without approval and accordingly there is no basis for any interdict.

S.S.D

21.4 it does not require a waste management licence in terms of the Waste Act because the transitional provisions of the Waste Act provide for the continuation of waste management activities provided they were being lawfully undertaken prior to the commencement of the provisions in the Waste Act applying to residue stockpiles and residue deposits.

21.5 if the court finds that the applicants have established the requirements for either an interim or a final interdict, the court should suspend the operation of any interdict it may be inclined to grant in order to give Tendele the opportunity to apply for the necessary statutory approvals without ceasing its mining operations, as it is the primary employer in the Somkhele area and the only livelihood of thousands of people.

Mining rights and approved EMP's held by Tendele

[22] No dispute arises on the papers concerning the mining rights being held by Tendele at Somkhele. In its answering affidavit deposed to by its CEO Mr Du Preez, Tendele points out that although the Somkhele mine comprises a single mining area, the mining operations are divided between five areas and separate mining rights apply to the different areas. All five areas fall within Reserve 3 in the magisterial district of Mtubatuba in KwaZulu-Natal. The mineral in respect of which all mining rights are held is coal.

[23] The mining right applicable to each area is as follows:

23.1 Area 1 mining right

On 21 May 2007, Tendele was granted a mining right in terms of section 23 of the MPRDA, bearing the Department of Mineral Resources' ("**DMR**") reference number KZN30/5/1/2/2/135MR ("**Area 1 mining right**")[11]

23.2 Area 2 and 3 converted mining right

On 1 February 2011, Tendele was granted a mining right in terms of Item 7 of Schedule 2 to the MPRDA bearing DMR reference number: KZN30/5/1/2/2/216MR ("**Areas 2 and 3 converted mining right**")[12]

[11] Annexure TCM5 to the answering affidavit at 250.

S. S.D.

23.3 Prior to the grant of the Areas 2 and 3 converted mining right, Tendele held a mining licence issued on 9 April 2003 in terms of section 9 of the (now repealed) Minerals Act 50 of 1991 ("Minerals Act") in respect of the two areas (bearing reference number KZN ML 354/2003). In accordance with the provisions of Item 7 of Schedule 2 of the MPRDA, Tendele applied for the conversion of its mining licence to a mining right following the commencement of the MPRDA on 1 May 2004.

23.4 On 8 March 2013 Areas 2 and 3's converted mining right was amended through an application in terms of section 102 of the MPRDA to include the KwaQubuka and Luhlanga areas (also known as Areas 8 and 9) into the ambit of Areas 2 and 3 converted mining right.[13]

23.5 On 31 May 2016, Tendele was granted a mining right in terms of section 23 of the MPRDA bearing DMR reference number: KZN3/5/1/2/2/10041MR ("**Areas 4 and 5 mining right**").[14]

23.6 Prior to the grant of Areas 4 and 5 mining right, Tendele was the holder of a converted prospecting right bearing DMR reference number: KZN3/5/1/2/2/86PR, having been granted such right on 4 April 2006. Prior thereto and on 18 September 2003, Tendele was granted a prospecting permit in accordance with the provisions of the Minerals Act in respect of Area 4 which, at the time, included the KwaQubuka and Luhlanga areas. Tendele commenced drilling activities in and on the KwaQubuka and Luhlanga areas in July 2777 in accordance with an old order prospecting right (as defined in Item 1 of Schedule 2 of the MPRDA, prior to the registration of the converted prospecting right in the Mining and Petroleum Titles Registration Office on 29 August 2007. In addition to the prospecting permit, Tendele took cession from AfriOre of a notarially executed mineral lease and prospecting contract with the Ingonyama Trust (the seventh respondent) on 14 May 2001.

---

[12] Annexure TCM6 to the answering affidavit at 263.
[13] Annexure TCM7 to the answering affidavit at 275.
[14] Annexure TCM8 to the answering affidavit at 280.

S.S.D.

23.7 An environmental management programme ("EMP"), as contemplated in the now repealed section 39 of the MPRDA, was approved by the DMR in respect of each of Tendele's mining rights as follows:

23.7.1 The EMP applicable to the Area 1 mining right was approved by the Regional Manager of the DMR: KwaZulu-Natal Province ("Regional Manager") on 22 June 2007.

23.7.2 The EMP attaching to the Areas 2 and 3 converted mining right was approved by the Regional Manager on 30 March 2011. Amendments to this EMP, to cater for the inclusion of the KwaQubuka and Luhlanga areas (Areas 8 and 9) were approved on 29 May 2012 in terms of section 102 of the MPRDA as mentioned above.

23.7.3 The EMP attaching to the Areas 4 and 5 mining right was approved by the Regional Manager on 31 May 2016.

Relevant background

Tendele's current mining operations

[24] Mr du Preez points out that at present Tendele is only actively mining in Area 1 and the extended area of Area 2, namely the KwaQubuka and Luhlanga areas. (As mentioned previously these areas are also known as Areas 8 and 9). The mine's coal wash plants, which are also presently in operation, are located in Area 2.

[25] Tendele commenced with its mining operations in Area 1 in July 2007 in accordance with the Area 1 mining right and the approved EMP in relation to that Area.

[26] Mining operations (in the form of drilling activities) also commenced in 2007 in Areas 8 and 9 in accordance with an old order prospecting right (as mentioned above). Mining operations commenced in Area 2 in 2006 in accordance with an old order mining right prior to the registration of the Areas 2 and 3 converted mining right. Mining operations continued in these areas after the commencement of the

S.S.D.

MPRDA in accordance with the Areas 2 and 3 converted mining right and the associated EMP.

[27] Mining operations are not being undertaken in and on Area 3. Mining operations ceased in Area 2 in January 2012 due to the depletion of the anthracite reserves. To date, mining operations have not commenced on Areas 4 and 5, notwithstanding the grant of the Areas 4 and 5 mining right and the approval of the associated EMP.

History of mining in the Somkhele area

[28] The following history of mining in the Somkhele area as contained in Tendele's answering affidavit is not disputed:

28.1 Since the discovery of significant quantities of anthracite in the Somkhele area in the 1880's, the Somkhele mining area became the subject of numerous prospecting and mining projects. In 1895 and in anticipation of coal mining in the Somkhele area, the construction of a railway line commenced from Durban to the Somkhele area. The first commercial extraction of anthracite from the Somkhele area occurred between 1903 and 1909 in what is now Area 4 of Reserve 3 when the now defunct Zululand Collieries produced a total of 49 209 tons of anthracite.

28.2 Between 1936 and 1939, Umfolozi Co-Op Sugar Planters Ltd tested the suitability of the anthracite from Somkhele for use at their sugar mills near Mtubatuba. Some 300 tons of anthracite were subsequently mined by Sugar Planters for use in the mechanically stoked boilers. In 1965, JCI Mining (Pty) Ltd ("**JCI**"), through Somkhele Prospecting Co. (Pty) Ltd, acquired a concession over an area extending from the Nongoma /Mtubatuba road in the south to the south-eastern corner of the Hluhluwe Game Reserve, constituting an area of 168 square kilometres. Between 1966 and 1976, JCI drilled numerous boreholes in search of anthracite in what is now Somkhele Areas 1, 3, 4, 5 and 9. The results of the exploratory drilling in Area 1 alone showed a total extractable reserve of 7.9 million tons of anthracite to a depth of 300 metres in an area of 330 hectares with open pit potential.

28.3 Between 1976 and 1982, JCI drilled further boreholes and conducted geophysical surveys in what is now Somkhele Area 2 and identified further potential anthracite reserves. In 1979, JCI acquired prospecting rights and authorisations in respect of what is now Somkhele Area 3 and drilled more boreholes in search of further anthracite reserves. In 1986 and 1987, further drilling activities were undertaken by JCI in Somkhele Area 1. Between 1994 and 2004, AfriOre Ltd ("**AfriOre**") acquired vaious mining interests in Somkhele. Between 2001 and 2003, AfriOre drilled numerous boreholes in what is now Somkhele Area 2 pursuant to a mining licence issued in terms of the now repealed Minerals Act. In 2004 AfriOre sold its interests in Somkhele to a consortium led by the New Africa Mining Fund ("**NAMF**").

28.4 In 2005, Petmin Limited, the holding company of Tendele, purchased all of the anthracite interests held by the NAMF in Somkhele. Tendele commenced mining operations in Somkhele Area 2 in 2006 pursuant to the grant of a mining licence and subsequently a mining right and the approval of an Environmental Management Programme ("**EMP**") as described in more detail below. Mining operations also commenced in Area 1 in 2007 pursuant to the grant of a mining right as further discussed below. Similarly, Tendele commenced mining operations (comprising drilling activities) in Areas 8 and 9 in July 2007, as set out above.

Somkhele mine and socio-economic development

[29] The Somkhele mine is located approximately 18km to the west of Mtubatuba and 52km north east of Richards Bay within Reserve 3 (Somkhele No. 15822 in the Magisterial District of Mtubatuba, KwaZulu-Natal Province). Although mining operations commenced in the Somkhele area in the mid-1880's Tendele commenced mining operations at the Somkhele mine in 2006. The mineral mined at Somkhele is anthracite – a hard, compact variety of coal which has the highest carbon content, the fewest impurities and the highest energy density of all types of coal except for graphite.

[30] Somkhele has one of the largest resources of open-pit mineable anthracite reserves in South Africa. Tendele currently sells the higher quality anthracite mined at Somkhele (constituting 50% of total production) to local ferrochrome producers and is, in fact, the principal supplier of anthracite to ferrochrome producers in South Africa. The high quality anthracite is a critical component of the reductant mix used in smelters by ferrochrome producers. At present Tendele sells 730 000 tons of anthracite per annum to local ferrochrome producers.

[31] The production of ferrochrome requires anthracite that is low in sulphur and phosphorus which is in increasingly short supply in South Africa. Tendele is said to be unique among South African anthracite producers as other anthracite producers cannot produce the qualities and quantities consistently required by ferrochrome producers. If Tendele does not supply anthracite to the local ferrochrome market, it is likely that local ferrochrome producers would be required to import its reductants (being either anthracite or low sulphur coke breeze) in order to continue production which would significantly increase the cost of the production of ferrochrome – a crucial component in the production of stainless steel. Increased production costs may, for example, result in retrenchments which will negatively affect South Africa's trade balance and have associated regional and national economic impacts. South Africa is the second largest producer of ferrochrome in the world, with China being the largest.

[32] According to Mr Du Preez, Somkhele has had a significant and positive impact on the communities surrounding the mine through, *inter alia*, investment, training and job creation. Tendele currently employs over 1 000 people at Somkhele, with 83% of employees residing in the impoverished Mpukunyoni Area surrounding Somkhele. This means that 830 households in the Mpukunyoni Area (Somkhele's hosting community) benefit from employment at Somkhele. Not only does Tendele employ over 1 000 people at Somkhele through training initiatives, Somkhele has procured services from local entrepreneurs from the Mpukunyoni Area. These entrepreneurs employ in excess of a further 200 people from the local community. Such services include, *inter alia*, the transportation of anthracite to the Richards Bay port, laundry services at Somkhele and local transport and taxi services for Somkhele employees.

S.S.D

[33] The Mtubatuba Local Municipality Integrated Development Plan ("**IDP**") for 2017/2018 – 2022 provides, at 13.1 that

> "...mining is one of the major employment sectors in Mtubatuba Municipality through Somkhele Coal Mine ... [I]t is a well-known fact that the majority of people working in this mine are locals (within Mtubatuba Municipal area, Mpukunyoni Traditional Council in particular".

It is further recognised in the IDP, *inter alia*, that

> "[T]he unemployment rate within Mtubatuba Municipality was at 59.7% in 2001, however in 2011 there ... [was] a significant improvement as it is estimated to be at 39%. This may be due to the coal mining operation taking place in the Mpukunyoni Traditional Council area, Somkhele Mine".

It is further stated at 13.1.1 of the IDP that the Mtubatuba Municipality's economy is driven by the performance and structures of, *inter alia*, mining at Somkhele.

[34] Tendele asserts that to date 800 households in the Mpukunyoni Area have received training in farming activities through an initiative introduced by it. The majority of these households are female-headed households. Tendele has undertaken to construct a trade hub at which these farmers can sell their produce. Through the Municipal Local Economic Development division, Tendele is in the process of procuring tractors and other equipment to support local farming in the Mpukunyoni area.

[35] In addition (and amongst other training programmes), Tendele offers adult basic education and training which has been completed by 935 people between 2010 and 2017 at both the training centre constructed by Tendele at Somkhele and at an education centre in a nearby area that was refurbished by Tendele and is rented from the Mtubatuba Municipality. The education centre provides mathematics and science programmes for school children and matric study support. Tendele provides student teachers in community schools to assist with education. Sixteen (16) apprentices have completed learnerships at Somkhele, 7 of whom have been employed at Somkhele. To date, 817 people have obtained National Certificates: N1

S.S.D

– N3 Engineering Studies (mechanical) from the Umfolozi TVET College in Richards Bay at the Somkhele education centre. In addition, Tendele offers bursaries for tertiary studies to students in the various local communities, eighty four (84) bursaries were awarded by Tendele between 2008 and 2017.

[36] Between December 2006 and December 2016, Tendele spent R719m paying local community employee salaries; R54m on community projects in accordance with approved Social and Labour Plans attaching to each of the Tendele Mining Rights; and R300m on procuring services from community based black economic empowerment companies.

[37] In addition, Tendele has, *inter alia*, constructed new homes with water as well as sewerage and electricity infrastructure for community members who were required to be relocated by Tendele; provided local communities with potable water delivered by water tankers since 2015 at a cost of R100 000.00 a month as the Mtubatuba Municipality was unable to provide water to certain areas surrounding Somkhele; constructed the Siphelele Primary School and a soccer field, at a cost of approximately R10m and assisted with the provision of teachers as well as basic maintenance and water (when required); constructed the Somkhele Maternity Ward at the Somkhele clinic at a cost of R3.5m after consultation with the Department of Health; constructed large community halls in Dubelenkunzi, Machibini, KwaMyeki and Esiyembeni (which are community areas surrounding Somkhele); and constructed community roads and bridges.

[38] In 2015 Tendele concluded a R350m transaction giving local communities surrounding Somkhele as well as Tendele employees a 20% stake in Somkhele. As a result, a BEE special purpose vehicle holds 20% of the shares in Tendele which in turn is held 80% by a trust established for the benefit of the youth in the Mpukunyoni community and 20% is held by a trust for the benefit of all employees of the Somkhele mine. As a result, the Mpukunyoni community and Tendele employees directly benefit from the continued operation of Somkhele.

[39] A further recent development highlighted by Mr Du Preez is the establishment in early 2017 of a community structure, known as the Mpukunyoni Community

C.S.D.

Mining Forum ("**MCMF**"). This was established after numerous consultations with various interest groups including, *inter alia*, traditional structures in the Mpukunyoni Area, local entrepreneurs and businesses, Tendele employees, non-governmental organisations and non-profit organisations operating in the Mpukunyoni Area and representatives of the Mtubatuba Municipality. Tendele claims that the MCMF represents the interest of the communities in the Mpukunyoni Area in respect of the mining operations undertaken at Somkhele and has the following representatives (amongst others) – the Inkosi (representing the 8 Royal Houses (related to the Zulu King) of the Mpukunyoni Area, the Traditional Council and the Traditional authority); the Indunankulu, Chief Induna of the Mpukunyoni Area; the Mayor of the Mtubatuba Municipality (or his/her nominee), in his/her capacity representing the entire Mtubatuba Municipality; the 8 Indunas of the areas in which the mine operates; representatives of local entrepreneurs; full-time shop stewards; and faith-based organisations.

[40] In each of the 8 areas surrounding Somkhele, Tendele points out that a democratically elected mining area committee ("**MAC**") has been established to ensure that the wider community is represented. The various MACs are consulted through the MCMF, ensuring that the interests of each of these communities are protected. Tendele has developed a roadmap with the input of MCMF representatives which was subsequently signed by, *inter alia*, community leaders on 29 March 2017. The road map outlines the purpose of the MCMF and provides a platform through which, *inter alia*, community leaders and individuals are consulted with regard to activities undertaken at Somkhele; complaints can be raised regarding the activities at Somkhele; social and labour plans are developed (to the benefit of the community); and compliance with Tendele's black economic empowerment obligations are ensured to the long-lasting benefit of the community.

Applicant's founding papers

[41] As I pointed out above, the applicants' founding papers were deposed to by Mr Dladla who resides in an area known as Nkolokotho near the site of the coal mining conducted by Tendele at Somkhele. Much of the founding affidavit is taken up by a reference to the various pieces of legislation in respect of which the applicants allege that Tendele is acting unlawfully. I will deal with this legislation in

S.S.D.

due course as they pertain to the issues identified for determination above. For now it is convenient to highlight some of the difficulties being encountered by Mr Dladla and other members of the second applicant who are all resident in close proximity to the mining operations at Somkhele and are directly affected thereby.

[42] Mr Dladla points out that he and his family were opposed to coal mining in the area from inception. The quality of life has changed completely since Tendele commenced its mining operations. The entire area was used for grazing purposes before Tendele arrived. In 2009 the area was fenced off by Tendele without notice. In 2014 Mr Dladla's family lost 2 head of cattle due to mining operations. This was because the fence that was put up was not properly maintained. No compensation was given by Tendele. Goats belonging to his family would enter the mining area and not return. At one point the family owned 15 goats and now it has none.

[43] Rainwater which is stored in drums for drinking purposes becomes contaminated with dust from the mining operations. Drinking water now has to be extracted from the Mfolozi River. However, when this river ran dry in 2016, the residents were without water for months. While Tendele went ahead and sank 4 to 5 boreholes alongside the river, these were for its mining operations only. The Nkolokotho stream that feeds the Mbukwinini Dam is often polluted from the wash down areas and pollutes the dam in the process.

[44] Mr Dladla avers that blasting occurs about twice a week – an alarm is sounded to warn residents and within 30 minutes blasting takes place. Blasting results in the houses shaking and windows rattling. In 2010 and as a result of the blasting taking place close to his house, cracks were caused around the doorframes. The walls and houses of some residents also collapsed. Mining operations have now also resulted in less firewood due to fencing by the mine or trees being removed for mining purposes. According to Mr Dladla Tendele's mining operations have had a serious impact on the environment. On the mining site there are massive stockpiles of waste rock and the production of coal sludge. This is known as slurry and is the liquid coal waste produced by coal mining activities. The waste slurry water is toxic containing elements of mercury, arsenic, beryllium, cadmium, nickel and selenium.

S.S.D

[45] All in all, Mr Dladla points out that the quality of the environment has been materially affected by the mining operations. What was once a quiet rural setting alongside the Wilderness area is now a vast industrial rock dump. Efforts by his late father in 2013 to engage the regional manager of DMR about Tendele's operations proved futile.

[46] On the issue of graves Mr Dladla avers that the site of the mining is the residence of the communities that have always lived there. The fenced-off areas of the mine include some houses of people who always lived there. This has given rise to conflict over the issue of graves in these areas. For instance, the cemetery of one group of residents is located inside the Area 1 portion of the mining operations. In respect of the extended Area 2 at KwaQubuka the cemetery has been fenced into the mining operations. As such they are inaccessible to the local residents who wish to visit them. Notices are posted at the site of the graves which inform the residents that they have a right to negotiate with Tendele on the relocation of their family graves. However, the notices themselves are inaccessible to the local residents as they are within the fenced off security area. Furthermore, the access area is extremely dangerous with trucks and earthmoving equipment working in the vicinity. The graves are marked by plastic tape only. The graves at KwaQubuka are being damaged and altered although they have not as yet been relocated. Many graves have been moved in other areas.

[47] Against this backdrop I turn to consider whether the applicants have made out a proper case for the relief sought.

Environmental authorisations

[48] The two pieces of legislation that are relevant here are NEMA (1998) on the one hand and the MPRDA (2002) on the other. Both statutes have undergone substantial and significant changes over the years. It is perhaps convenient to pause briefly in order to deal with the issue of environmental authorisations and listing notices prior to the amendments which came into effect on 8 December 2014. In terms of NEMA an applicant who intends to commence an activity specified in a listing notice, needs an environmental authorisation as contemplated in s 24. The listing notices are promulgated by the Minister of Environmental Affairs. The listing

S.S.D.

notices identify the competent authority for granting the environmental authorisation. It seems that prior to 8 December 2014 mining *per se* was not a listed activity, however anyone intending to embark on mining would of necessity have to perform certain activities which were listed activities (e.g. establishing infrastructure for bulk transportation of water; facilities for the storage of fuel; clearing indigenous vegetation covering more than 1 hectare, etc.) and would therefore have required environmental authorisation for those activities in terms of s 24.

[49] The primary purpose of the MPRDA is to make provision for equitable access to and sustainable development of the nation's mineral and petroleum resources. In its preamble the MPRDA, *inter alia*, affirms the State's obligations to protect the environment for the benefit of present and future generations, to ensure ecologically sustainable development of mineral and petroleum resources and to promote economic and social development. The objects of the MPRDA are set out in section 2.[15]

[50] Prior to 8 December 2014 the environmental impacts of mining were regulated exclusively through the MPRDA (2002) and through a requirement under that Act to obtain an environmental management plan (EMP) prior to commencing mining and to ensure that mining takes place in accordance with such an approved

---

[15] Section 2 of the MPRDA provides that the objects of the MPRDA are to –

(a) recognise the internationally accepted right of the State to exercise sovereignty over all the mineral and petroleum resources within the Republic;
(b) give effect to the principle of the State's custodianship of the nation's mineral and petroleum resources;
(c) promote equitable access to the nation's mineral and petroleum resources to all the people of South Africa;
(d) substantially and meaningfully expand opportunities for historically disadvantaged persons, including women and communities, to enter into and actively participate in the mineral and petroleum industries and to benefit from the exploitation of the nation's mineral and petroleum resources;
(e) promote economic growth and mineral and petroleum resources development in the Republic, particularly development of downstream industries through provision of feedstock, and development of mining and petroleum inputs industries;
(f) promote employment and advance the social and economic welfare of all South Africans;
(g) provide for security of tenure in respect of prospecting, exploration, mining and production operations;
(h) 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; and
(i) ensure that holders of mining and production rights contribute towards the socio-economic development of the arears in which they are operating.

S.S.D.

EMP. Section 22[16] of the MPRDA deals with applications for a mining right. Although the application is made to the Minister in charge, it is lodged with the office of the regional manager in whose area the land is situated. In terms of section 23 the Minister of Minerals and Energy must grant a mining right if the conditions specified in sub-section (a) to (h) are met.

[51] Prior to 8 December 2014, s 28(5) of the MPRDA provided that a mining right came into effect on the date on which the environmental management programme was approved in terms of s 39(4). Section 37 prescribed that the environmental management principles set out in s 2 of NEMA (1998) applied (a) to all prospecting and mining operations, as the case may be, and any matters relating to such operations and (b) served as guidelines for the interpretation, administration and implementation of the environmental requirements of the MPRDA. Section 38[17]

---

[16] Section 22 provides as follows:

(1) Any person who wishes to apply to the Minister for a mining right must lodge the application –
   (a) At the office of the Regional Manager in whose region the land is situated;
   (b) In the prescribed manner; and
   (c) Together with the prescribed non-refundable application fee.
(2) The Regional Manager must accept an application for a mining right if –
   (a) The requirements contemplated in subsection (1) are meant; and
   (b) No other person holds a prospecting right, mining right, mining permit or retention permit for the same mineral and land.
(3) If the application does not comply with the requirements of this section, the Regional Manager must notify the applicant in writing of that fact within 14 days of the receipt of the application and return the application to the applicant.
(4) If the Regional Manager accepts the application, the Regional Manager must, within 14 days from the date of acceptance, notify the applicant in writing –
   (a) To conduct an environmental impact assessment and submit an environmental management programme for approval in terms of section 39, and
   (b) To notify and consult with interested and affected parties within 180 days from the date of the notice.
(5) The Minister may by notice in the Gazette invite applications for mining rights in respect of any land, and may specify in such notice the period within which any application may be lodged and the terms and conditions subject to which such rights may be granted.

[17] Section 38(1) provided as follows:

Integrated environmental management and responsibility to remedy (1) The holder of a reconnaissance permission, prospecting right, mining right, mining permit or retention permit –
(a) must at all times give effect to the general objectives of integrated environmental management laid down in Chapter 5 of the National environmental Management Act, 1998 (Act No. 107 of 1998);
(b) must consider, investigate, assess and communicate the impact of his or her prospecting or mining on the environment as contemplated in section 24 (7) of the National Environmental Management Act, 1998 (Act No. 107 of 1998);
(c) must manage all environmental impacts –
   (i) in accordance with his or her environmental management plan or approved environmental management programme, where appropriate;
   and
   (ii) as an integral part of the reconnaissance, prospecting or mining operation, unless the Minister directs otherwise;

S.S.D.

provided for an integrated environmental management and responsibility to remedy. The holder of a mining right was required to consider, investigate, assess and communicate the impact of its mining on the environment as contemplated in s 24(7) of NEMA and had to manage all environmental impacts in accordance with its approved mining EMP.

[52] Section 39 (now repealed) of the MPRDA dealt with an environmental management programme and environmental management plan. In terms of s 39

> "(1) Every person who applied for a mining right in terms of section 22 was required to conduct an environmental impact assessment and to submit an environmental management programme within 180 days of the date on which he or she was notified to do so by the regional manager.
>
> (2) An applicant who prepared an environmental management programme or an environmental management plan was required to
>
> (a) establish baseline information concerning the affected environment to determine protection, remedial measures and environment objectives;
>
> (b) investigate, assess and evaluate the impact of his or her proposed prospecting or mining operations to
>
> (i) the environment;
>
> (ii) the socio-economic conditions of any person who might be directly affected by the prospecting or mining operations; and
>
> (iii) any national estate referred to in s 3(2) of the National Heritage Act, 1999 (Act No. 25 of 1999), with the exception of the national estate contemplated in section 3 (2) (i), (vi) and (vii) of that Act."

[53] Section 40 provided that when considering an environmental management plan or environmental management programme in terms of section 39, the Minister must consult with any State department which administers any law relating to matters affecting the environment. In terms of section 39(6) an environmental management plan or an environmental management programme could be amended

---

(d) must as far as it is reasonably practicable, rehabilitate the environment affected by the prospecting or mining operations to its natural or predetermined state or to a land use which conforms to the generally accepted principle of sustainable development; and

(e) is responsible for any environmental damage, pollution or ecological degradation as a result of his or her reconnaissance prospecting or mining operations and which may occur inside and outside the boundaries of the area to which such right, permit or permission relates.

by the Minister after consultation with the holder of a reconnaissance permission, prospecting right, mining right or mining permit, as the case may be.

[54] In light of the above, it is evident that the position prior to 8 December 2014 was that the Minister of Minerals and Energy's decision to approve an applicant's mining EMP and to grant the mining licence effectively constituted the environmental authorisation to conduct the mining activity. In terms of section 39(4)(b) of the MPRDA the Minister may not approve the environmental management programme or the environmental management plan unless he or she has considered (i) any recommendation by the regional mining development and environmental committee; and (ii) the comments of any State Department charged with the administration of any law which relates to matters affecting the environment.

[55] As I pointed out above NEMA and the MPRDA underwent significant changes in 2008 and subsequently the 'One Environmental System' was introduced by Government on 8 December 2014 through a number of legislative amendments. These included amendments to NEMA and to the MPRDA. NEMA was amended by the National Environmental Amendment Act 62 of 2008[18] (NEMA Amendment Act, 2008) and the National Environmental Management Laws Second Amendment Act 30 of 2013 and the National Environmental Management Laws Amendment Act 25 of 2014. The MPRDA was amended by the MPRDA Amendment Act 49 of 2008 (MPRDA Amendment Act, 2008).

[56] The amended EIA regulations and the new listing notices which accommodated the inclusion of mining among the listed activities for purposes of

[18] The preamble to the NEMA Amendment Act, 2008 reads as follows:
To amend the National Environmental Management Act, 1998, so as to insert certain definitions and to substitute others; to further regulate environmental authorisations; to empower the Minister of Minerals and Energy to implement environmental matters in terms of the National Environmental Management Act, 1998, in so far as it relates to prospecting, mining, exploration, production or related activities on a prospecting, mining, exploration or production area; to align environmental requirements in the Mineral and Petroleum Resources Development Act, 2002, with the National Environmental Management Act, 1998, by providing for the use of one environmental system and by providing for environmental management programmes, consultation with State departments, exemptions from certain provisions of the National Environmental Management Act, 1998, financial provision for the remediation of environmental damage, the management of residue stockpiles and residue deposits, the recovering of cost in the event of urgent remedial measures and the issuing of closing certificates as it relates to the conditions of the environmental authorisation; and to effect certain textual alterations; and to provide for matters connected therewith.

S.S.D

NEMA were promulgated on 4 December 2014 and came into effect on 8 December 2014. The amendments to NEMA relating to mining and the amendment to the MPRDA came into effect on 8 December 2014. In a government press release on 6 December 2014 it was stated that the roll out of the One Environmental System would start on 8 December 2014. As the preamble to the NEMA Amendment Act, 2008 provides, some of the objects of the Act are to further regulate environmental authorisations, to empower the Minister of Minerals and Energy to implement environmental matters in terms of NEMA (1998) insofar as it relates to prospecting, mining, exploration or related activities on a prospecting, mining, exploration or production area; and to align environmental requirements in the MPRDA (2002) with NEMA (1998) by, *inter alia*, providing for environmental management programmes.

Discussion and findings

[57] It is common cause that Tendele's mining operations commenced at Somkhele in 2006. These operations commenced pursuant to the grant of a mining right and subsequently a mining licence. The approval of EMP's for the respective mining areas were dealt with by the regional manager of the DMR on the dates already mentioned above. In the absence of any evidence to the contrary from the applicants, it must be assumed that all the EMP's were approved because they met the requirements as prescribed by the MPRDA at the time. It must be borne in mind (as alluded to earlier) that at that stage and prior to the implementation of the One Environmental System in 2014, the environmental impacts of mining were regulated exclusively through the MPRDA. It was a strict requirement under that Act for an applicant to obtain an EMP prior to commencing mining so as to ensure that mining takes place in accordance with an approved EMP.

[58] In attempting to make out a case for the relief claimed, the applicants make the following allegation without any substantiation in paragraph 36 of their founding affidavit:

> "Normally speaking, mining is a listed activity which has an impact on the environment and as such an environmental authorisation ('EA') must be obtained in terms of the National Environmental Management Act 107 of 1998 (NEMA). This is procured by making an application in terms of section 24 of NEMA which is adjudicated by the Minister of Environment (sic) (Ninth Respondent) or the MEC

(Third Respondent). Section 24 provides a detailed and precise procedure for the application in respect of EA. Such process is referred to as EIA."

[59] This is followed by the following statement in paragraph 37:

"Under the former Act, the Environmental Conservation Act 73 of 1989 (ECA) a similar authority was required."

[60] Both in its answering affidavit and in argument before me Tendele has contended that the allegations as relied on by the applicants in paragraphs 36 and 37 above are patent errors when one has regard to the issue of environmental authorisation in relation to listed activities as contained in the statutory framework. Tendele points out first that applications for environmental authorisation for mining operations or activities directly related thereto were adjudicated by the Minister of Mineral Resources and not by the Minister of Environmental Affairs, and second that under the ECA (1989) which preceded the introduction of the One Environmental System in 2014, environmental authorisation under any environmental legislation was not required for mining operations or activities directly related thereto.

[61] To place matters in perspective it is necessary to have regard to certain provisions of NEMA in its present form. Chapter 5 of NEMA deals with "integrated environmental management". The purpose of the chapter as outlined in s 23(1) is to promote the application of appropriate environmental management tools in order to ensure the integrated environmental management activities. Section 23(2) of the chapter details the general objectives of integrated environmental management which are to:

"(a) promote the integration of the principles of environmental management set out in section 2 into the making of all decisions which may have a significant effect on the environment;

(b) identify, predict and evaluate the actual and potential impact on the environment, socio-economic conditions and cultural heritage, the risks and consequences and alternatives and options for mitigation of activities, with a view to minimising negative impacts, maximising benefits, and promoting compliance with the principles of environmental management set out in section (2);

(c) ensure that the effects of activities on the environment receive adequate consideration before actions are taken in connection with them;

(d) ensure adequate and appropriate opportunity for public participation in decisions that may affect the environment;

(e) ensure the consideration of environmental attributes in management and decision-making which may have a significant effect on the environment; and

(f) identify and employ the modes of environmental management best suited to ensuring that a particular activity is pursued in accordance with the principles of environmental management."

[62] Section 24 of NEMA is important as it deals with environmental authorisations. The section provides as follows:

"**Environmental authorisations** – (1) In order to give effect to the general objectives of integrated environmental management laid down in this Chapter, the potential consequences for or impacts on the environment of listed activities or specified activities must be considered, investigated, assessed and reported on to the competent authority or the Minister responsible for mineral resources, as the case may be, except in respect of those activities that may commence without having to obtain an environmental authorisation in terms of this Act

(1A) Every applicant must comply with the requirements prescribed in terms of this Act in relation to –

(a) steps to be taken before submitting an application, where applicable;

(b) any prescribed report;

(c) any procedure relating to public consultation and information gathering;

(d) any environmental management programme;

(e) the submission of an application for an environmental authorisation and any other relevant information; and

(f) the undertaking of any specialist report, where applicable."

[63] In terms of s 24(2)(a) of NEMA, the Minister or an MEC with the concurrence of the Minister is empowered to identify activities which may not commence without environmental authorisation from the competent authority. The sub-section contains a proviso which provides that where an activity falls under the jurisdiction of another Minister or MEC, a decision in respect of paragraphs (a) to (d) of the section must be taken after consultation with such other Minister or MEC. In terms of the definitions

contained in section 1, a "listed activity" when used in Chapter 5 means an activity identified in terms of section 24(2)(a) and (d).

[64] The legislative framework set out above relating to environmental authorisations and activities, is very similar to that contained in the predecessor to NEMA *viz* the ECA (1989) under which the Minister was required to identify activities which have a detrimental impact on the environment and required anyone intending to undertake such an activity to go through an EIA process in order to assess such impacts. Part of that process involved public participation and only once an applicant had ultimately satisfied the requirements of the EIA process could it proceed with the proposed activity.

[65] Section 24F of NEMA deals with prohibitions relating to the commencement or continuation of listed activities and provides in sub-section (1)(a) that

> "notwithstanding any other Act, no person may commence an activity listed or specified in terms of section 24(2)(a) or (b) unless the competent authority or the Minister responsible for mineral resources, as the case may be, has granted an environmental authorisation for the activity."

[66] From all of the above it becomes apparent that the statutory framework under the ECA dealing with environmental authorisations required the actual listing of activities which could not commence without such authorisation first being obtained. The listed activities were generally published by the Ministers of Environmental Affairs (and Tourism) from time to time. An examination of the listed activities as they were published between 1998 and 2006 reveals that mining *per se* was not part of such listing. The first listing of activities and competent authorities identified in terms of sections 24 and 24D of NEMA were published by then the Minister of Environmental Affairs and Tourism on 21 April 2006. Items 7 and 8 of the schedule relate specifically to mining: Item 7 deals with reconnaissance, exploration, production and mining as provided for in the MPRDA (2002), as amended in respect of such permits and rights; item 8 deals with permits and rights granted in terms of item 7 above or any other right granted "in terms of previous mineral legislation, the undertaking of any reconnaissance exploration, productions or mining related activity

S.S. D

or operation within a exploration, production or mining area", as defined in terms of section 1 of the MPRDA (2002).

[67] In argument Mr *Lazarus* pointed out, correctly in my view, that despite the inclusion of items 7 and 8 in the 2006 listing notices, these items never came into effect. It seems that this was solely because until 2014 when the two statutes underwent the significant changes alluded to already, the environmental impacts of mining were regulated exclusively under the MPRDA (2002) in terms of approved EMP's.

[68] In light of the above one of the fundamental difficulties facing the applicants is that they have simply failed to identify precisely what activities Tendele has embarked upon without obtaining the necessary environmental authorisations therefor. In my view the general statement contained in paragraph 36 of their founding affidavit does not go far enough to establish a proper cause of action on the issue of any illegality on the part of Tendele. In reply and whilst the applicants concede that there are no listed activities relating to mining as a special category, they nonetheless aver that there are a host of listed activities which are associated with mining. They rely in this regard on a table put up as annexure 'R1' to the replying affidavit. Again, no attempt is made by them to identify these activities or when they commenced. In sub-paragraph 4.3 of their heads of argument they attempt to put up some sort of list by making the following submission:

> "4.3 Though mining only became a listed activity following the NEMA amendments which came into effect in December 2014, the First Respondent would have had to execute a number of listed activities pursuant to engaging in mining operations, these would include the following listed activities, amongst a list of others:
>
> 4.3.1 The construction of facilities or infrastructure for the storage of coal;
>
> 4.3.2 The construction of facilities or infrastructure for the storage of hazardous waste;
>
> 4.3.3 The construction of facilities or infrastructure for the off-stream storage of water, including dams and reservoirs."

[69] The general rule in motion proceedings is that an applicant must stand or fall by the founding affidavit and the facts alleged in it. It is certainly not permissible to make out a case or allege new grounds in reply. In the present matter the applicants have not only failed to make out a proper case in their founding affidavit but their belated attempt in their replying affidavit in putting up a document (annexure R1) without any elaboration of its contents in the affidavit itself, cannot be permitted. In any event, even if they were permitted to make such a case, they have failed to pinpoint when these activities were listed (whether in terms of the ECA regulations in 2006 or in terms of NEMA in 2010) and when Tendele commenced with them without obtaining the necessary environmental authorisations.

[70] The second and perhaps the most important hurdle facing the applicants on the issue of environmental authorisations relates to the transitional arrangements contained in the One Environmental System that came into effect on 8 December 2014. These are contained in section 12 of the NEMA Amendment Act, 2008 and read as follows:

"12. Transitional provisions –

(1) Anything done or deemed to have been done under a provision repealed or 25 amended by this Act—

(a) remains valid to the extent that it is consistent with the principal Act as amended by this Act until anything done under the principal Act as amended by this Act overrides it; and

(b) subject to paragraph *(a), is* considered to be an action under the corresponding 30 provision of the principal Act as amended by this Act.

(2) An application for authorisation of an activity that is submitted in terms of Chapter 5 of the principal Act and that is pending when this Act takes effect must, despite the amendment of the principal Act by this Act, be dispensed with in terms of Chapter 5 of the principal Act as if Chapter 5 had not been amended. 35

(3) Section 24G of the principal Act applies with the changes required by the context in respect of any activity undertaken in contravention of section 22 of the Environment Conservation Act, 1989 (Act No. 73 of 1989), if such activity is a listed activity under the principal Act.

S.C.D

(4) An environmental management plan or programme approved in terms of the Mineral and Petroleum Resources Development Act, 2002 (Act No. 22 of 2002) immediately before the date on which this Act came into operation must be regarded as having been approved in terms of the principal Act as amended by this Act.

(5) (a) Notwithstanding sub-section (4), the Minister of Minerals and Energy may direct any holder or any holders of an old order right, if he or she is of the opinion that the prospecting, mining, exploration or production operations in question are likely to result in unacceptable pollution, ecological degradation or damage to the environment, ecological degradation or damage to the environment, to take such action to upgrade the environmental management plan or programme to address the deficiencies in the plan or programme as the Minister may direct in terms of the principal Act as amended by this Act.

(b) For the purposes of this sub-section, "Minister of Minerals and Energy", "holder" and "holder of an old order right" have the meanings assigned to them in section 1 of the principal Act as amended by the Act.

(6) Any appeal lodged in terms of section 96 of the Mineral and Petroleum Resources Development Act, 2002, against a decision in respect of environmental aspects, that is pending on the date referred to section 14 (2) (b) of the National Environmental Management Amendment Act, 2008 must be dealt with in terms of the Mineral and Petroleum Resources Development Act, 2002.

(7) An application for a right or permit in relation to prospecting, exploration, mining or production in terms of the Mineral and Petroleum Resources Development Act, 2002 that is pending on the date referred to in section 14 (2) (b) of the National Environmental Management Amendment Act, 2008, must be dispensed of in terms of that Act as if that Act had not been amended."

(My emphasis)

[71] It would seem to me that the transitional provisions contained in s 12 above adequately caters for the position of a mining operator such as Tendele as at 14 December 2014 when the amendment took effect. I am accordingly in agreement

S.S.D.

with the submissions advanced on behalf of Tendele which are to the following effect:

71.1 The first is that properly interpreted, section 12(4) of the NEMA Amendment Act has the consequence that an EMP approved in terms of the MPRDA before the coming into effect of the NEMA Amendment Act has the status of an environmental authorisation under NEMA. Section 12(4) of the NEMA Amendment Act provides that an EMP approved in terms of the MPRDA immediately before the commencement date of the provisions of the NEMA Amendment Act, 2008 dealing with prospecting, mining and related activities, must be regarded as having been approved in terms of NEMA as amended. The purpose of the transitional provision is no doubt to entitle the holder of an EMP that was lawfully conducting mining operations in terms of the applicable statutory provisions as at 8 December 2014 to continue to do so after that date. One can well imagine what would have happened if this was not the case: the result would have been to render existing lawful mining operations unlawful overnight. This would have been an unreasonable, insensible and unbusinesslike result.[19] Section 12(4) clearly seeks to avoid such a consequence.

71.2 This argument by Tendele is supported by the presumption against retrospective interpretation of statutes. A statute is retrospective "if it takes away or impairs a vested right acquired under existing laws, or creates a new obligation, or imposes a new duty, or attaches a new disability, into events already past".[20] Our courts have consistently established that no statute is to be construed as having a retrospective effect unless the Legislature clearly intended that result:

> "One may start the conspectus by stating the time-honoured principle formulated in *Peterson v Cuthbert and Company Ltd* 1945 AD 420 at 430, based upon the Roman-Dutch Law, that no statute is to be construed as having retrospective operation (in the sense of taking away or impairing a vested right acquired under existing laws), unless the Legislature clearly

---

[19] *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) which was quoted and further elucidated in *Bothma – Batho Transport (EDMS) Bpk v S Bothma en Seun Transport (EDMS) Bpk* 2014 (2) SA 494 (SCA) paras 18 – 12.

[20] *Minister of Public Works v Haffejee NO* 1996 (3) SA 745 (A) at 752A-B.

intended the statute to have that effect (see also, *inter alia*, *Bartman v Dempers* 1952 (2) SA 577 (A) at 580C)." [21]

71.3 As at 7 December 2014 Tendele had a vested right to conduct mining operations at Somkhele in terms of valid mining rights and the approved EMP's. If the enactment of the One Environmental System was intended to extinguish that right and overnight to render Tendele's existing mining operations unlawful, it would have had to contain a clear indication that this is what the Legislature intended. On the contrary s 12(4) of the NEMA Amendment Act clearly provides that a previously valid EMP is regarded as having been approved of in terms of s 24N of NEMA. As I alluded to earlier, Tendele's EMP's in relation to Areas 1, 2 and 3 were approved by the regional manager prior to 8 December 2014 and therefore must be regarded as having been approved in terms of NEMA as amended by the NEMA Amendment Act, 2008.

71.4 The new s 38B of the MPRDA, inserted by Act 49 of 2008 contains what may be regarded as a further transitional provision, however it has not yet come into operation. Section 38B reads as follows:

"38B. **Approved environmental management plans and environmental plans. –**

(1) An environmental management plan or environmental management programme approved in terms of this Act before and at the time of the coming into effect of the National Environmental Management Act, 1998, shall be deemed to have been approved and an environmental authorisation been issued in terms of the National Environmental Management Act, 1998.

(2) Notwithstanding subsection (1), the Minister may direct the holder of a right, permit or any old order right, if he or she is of the opinion that the prospecting, mining, exploration and production operations is likely to result in unacceptable pollution, ecological degradation or damage to the environment, to take any action to upgrade the environmental

[21] *Unitrans Passenger (Pty) Ltd t/a Greyhound Coach Lines v Chairman, National Transport Commission and Others; Transnet (Autonet Division) v Chairman National Transport Commission and Others* 1999 (4) SA 1 (SCA) para 12.

S.S.D.

management plan or environmental management programme to address the deficiencies in the plan or programme.

(3) The Minister must issue an environmental authorisation if he or she is satisfied that the deficiencies in the environmental management plan or environmental management programme in subsection (2) have been addressed and that the requirements in Chapter 5 of the National Environmental Management Act, 1998, have been met."

71.5 The second is that if there were any defects in the manner in which Tendele was conducting its mining operations in terms of its pre-existing EMP's, the Minister of Minerals and Energy is empowered to take action against Tendele to address such deficiencies. This power is exercised by the Minister in terms of s 12(5). In terms of the sub-section, if the Minister of Minerals and Energy forms the opinion that the prospecting or mining operations are likely to result in unacceptable pollution, ecological degradation or damage to the environment, the Minister may direct any holder or any holder of an old order right to take such action to upgrade the environmental management plan or programme to address the deficiencies in the plan or programme as the Minister may direct in terms of the principal Act as amended by the NEMA Amendment Act, 2008. To date the Minister has not acted against Tendele in terms of s 12(5) of the NEMA Amendment Act, 2008. This suggests to me that the Minister is thus far satisfied about Tendele's approved EMP's and the manner in which it conducts its mining operations at Somkhele. In any event there is no evidence whatsoever on the papers that point to a complaint/s being lodged with the Minister directly in this regard.

71.6 The third relates to section 24L(4) of NEMA which empowers the Minister to regard an approved EMP to be an environmental authorisation in terms of NEMA provided certain conditions are met. Section 24L[22] deals with the alignment of environmental authorisations. Sub-section (4) provides that:

---

[22] '24L. **Alignment of environmental authorisations** – (1) A competent authority empowered under Chapter 5 to issue an environmental authorisation and any other authority empowered under a specific environmental management Act may agree to issue an intergrated environmental authorisation.

(2) An intergrated environmental authorisation contemplated in subsection (1) may be issued only if –

S.S.D.

"A competent authority empowered under Chapter 5 to issue an environmental authorisation may regard an authorisation in terms of any other legislation that meets all the requirements stipulated in section 24 (4) (a) and, where applicable, section 24 (4) (b) to be an environmental authorisation in terms of that chapter."

71.7 The Minister responsible for mineral resources remains the competent authority empowered under Chapter 5 of NEMA to issue an environmental authorisation. On a proper interpretation of sub-section (4) and read in context, it is evident that Tendele's EMP's constitute "an authorisation in terms of any other legislation." As I already pointed out, Tendele's EMP's pre-date the introduction of the One Environmental System in 2008 which came into effect on 8 December 2014.

71.8 From the above it seems to me that the Minister is well aware of Tendele's operations at Somkhele and that they are conducted in terms of approved EMP's. He also seems to be satisfied that such EMP's adequately address the environmental impacts of such operations at Somkhele. If the Minister was not so satisfied he would not have granted Tendele further mining rights as he did in 2016 to expand its mining operations in Reserve 3.

71.9 In light of all the above, I must accordingly conclude that the applicants have simply failed to make out a proper case for an interdict (temporary, structural or otherwise) on this aspect. I proceed to address the further complaints raised by the applicants.

(a) the relevant provisions of this Act and the other law or specific environmental management Act have been complied with; and
(b) the environmental authorisation specifies the -
  (i) provisions in terms of which it has been issued; and
  (ii) relevant authority or authorities that have issued it.

(3) A competent authority empowered under Chapter 5 to issue an environmental authorisation in respect of a listed activity or specified activity may regard such authorisation as a sufficient basis for the granting or refusing of an authorisation, a permit or a licence under a specific environmental management Act if that specific environmental management Act is also administered by that competent authority."
(repeat)

S.S.D.

Land use approvals

[72] In support of their contentions that Tendele has no land use authority, approval or permission from any municipality having jurisdiction, the applicants aver that Tendele is undertaking mining operations in contravention of the KwaZulu-Natal PDA, the Mtubatuba By-law and SPLUMA (the Spatial Planning and Land use Management Act). In particular they contend that section 38 of the KwaZulu-Natal PDA requires municipal approval for the development of land situated outside the area of a land use scheme; section 46 of the Mtubatuba By-law similarly requires municipal planning approval for the development of land situated outside the area of a land use scheme, and lastly that section 26(3) of SPLUMA provides that:

> "Where no town planning or land use scheme applies to a piece of land, before a land-use scheme is approved in terms of this Act such land may be used only for the purposes listed in Schedule 2 to this Act [which include "mining purposes"] and for which such land was lawfully used or could lawfully have been used immediately before the commencement of this Act".

[73] The following further allegations are contained in paragraphs 65 and 66 of the founding affidavit:

> "65
>
> The area in which mining is taking place by Tendele was hitherto part of the Hlabisa Local Municipality (Sixth respondent). On 18 January 2008 the Municipal Demarcation Board gave notice in terms of section 21 of the Local Government: Municipal Demarcation Act 27 of 1998 that the boundaries would change. The changes were set out in the Provincial Gazette dated 18 January 2008. I annex hereto a copy marked 'K' hereto.
>
> 66
>
> In due course the MEC for Co-operative Governance and Traditional Affairs for KwaZulu-Natal issued a proclamation dated 16 May 2011 as Provincial Notice No. 49 altering the boundary between Hlabisa Municipality and Mtubatuba Municipality with the effect that Reserve 3 was henceforth in the Mtubatuba Municipality. I annex hereto a copy thereof marked "L". This notice refers to the demarcation notice referred to above."

[74] In paragraph 67 of the founding affidavit the applicants point out that both local municipalities (Hlabisa and Mtubatuba) advised their attorney that no planning

S.S.D.

approval or land use approval was required for mining operations undertaken by Tendele at Somkhele. The applicants' further point out that while the land on which the mining rights have been granted is Ingonyama Trust land, the Mtubatuba Municipality had full jurisdiction over the land in the functional area of municipal planning since 16 May 2011 and before that it was the Hlabisa Municipality. The applicants contend that in terms of s 38 of the KwaZulu-Natal PDA municipal approval was required for any development of the land and that such approval was required to be given by the municipality having jurisdiction. They further contended that in terms of s 43(2) of the Integrated Development Plan (IDP) the municipality concerned was required to take into account, *inter alia*, the protection or preservation of cultural and natural resources and biodiversity and the potential impact of the proposed development on the environment, socio-economic conditions and cultural heritage.

[75] In light of the above, Mr *Dickson* submitted first that the exercise of a mining right in terms of the MPRDA is subject to the provisions of SPLUMA and the KwaZulu-Natal PDA and therefore such right may only be exercised if a development application has been submitted and the zoning scheme in terms of SPLUMA and the KwaZulu-Natal PDA permits mining on the said land; and that second this was because the municipality is the exclusive authority in respect of municipal planning which includes land use. In support of these submissions Mr *Dickson* placed reliance on the judgments of the Constitutional Court in the matters of *Maccsand (Pty) Ltd v City of Cape Town and Others*,[23] and *Johannesburg Metropolitan Municipality v Gauteng Development Tribunal*.[24]

[76] The *Johannesburg Metropolitan* matter had to do with the meaning of "municipal planning" a term not defined in the Constitution. The court found that "planning" in the context of municipal affairs

> "is a term which has assumed a particular, well-established meaning which includes the zoning of land and the establishment of townships. In that context, the term is commonly used to define the control and regulation of the use of land. There is nothing in the Constitution indicating that the work carries a meaning other than the

[23] 2012 (4) SA 181 (CC) paras 34 and 40 – 51.
[24] 2010 (6) SA 182 (CC) paras 49 – 57.

S.S.D.

> common meaning which includes control and reputation of the use of land. It must be assumed, in my view, that when the Constitution drafters chose to use 'planning' in the municipal context, they were aware of its common meaning. As a result I find that the contested powers fall part of 'municipal planning.'"[25]

[77] At the heart of the dispute in the *Maccsand* matter was the interplay in the mining sector between the MPRDA (2002), on the one hand, and on the other, the Land Use Planning Ordinance (LUPO) and NEMA (1998). LUPO is a pre-Constitution Legislation which came into force in July 1986. It constitutes provincial legislation that was enacted by the Provincial Council of the former Cape of Good Hope. The interim Constitution permitted it to continue in force subject to amendment or repeal by the competent authority. While as national legislation the MPRDA applies throughout the country, LUPO on the other hand applied only in three provinces: the Western Cape, parts of the Eastern Cape and parts of the North West Province. While the MPRDA governs mining, LUPO regulated the use of land. However, it had no application in KwaZulu-Natal where land use was regulated primarily by the KwaZulu-Natal Town Planning Ordinance, 27 of 1949 ("the KwaZulu-Natal Town Planning Ordinance"). The KwaZulu-Natal PDA only came into operation on 1 May 2010. I deal hereunder with the relevant provisions of these two pieces of legislation insofar as they have a bearing on the issue of land use as raised by the applicants.

[78] Section 11(2)(a) of the KZN Town Planning Ordinance provided that:

> "No person shall without the prior authorisation of the responsible member of the Executive Council, develop within the meaning of the section any land whether inside or outside the municipal area ..."

[79] In the matter *of Mtunzini Conservancy v Tronox KZN Sands (Pty) Ltd and another*,[26] the Durban High Court (per Vahed J) considered the ambit of the above provision and concluded that since the Ordinance did not regulate mining operations (at least prior to the amendment of the Ordinance on 10 October 2008 which catered

---

[25] Per Jafta J, para 57.
[26] 2013 (4) BCLR 467 (KZN).

for mining specifically), the commencement of such activities prior to October 2008 did not require municipal consent for the purposes of the Ordinance.

[80] As already mentioned, Tendele's operations commenced before 10 October 2008. Prior to Tendele's involvement in mining operations at Somkhele in 2006, other mining companies and entities were already mining in that area pursuant to, *inter alia*, mining rights issued under the now repealed Mineral's Act (see the "history of mining in the Somkhele area" as outlined above). In *Tronox*, *supra*, Vahed J concluded, correctly in my view, that mining authorisations granted in terms of the Minerals Act were only subjected to that Act and no other. Whilst Tendele took over some of those mining rights as well as prospecting rights which were later converted to mining rights in some of the reserves (see the various mining rights held by Tendele in the areas concerned as outlined above), no municipal consent was required in terms of the Ordinance.

[81] As far as the KwaZulu-Natal PDA is concerned, this Act came into operation on 1 May 2010. Section 38(1) of the Act provides that:

> "The development of land situated outside the area of a scheme may only occur to the extent that it has been approved by a municipality in whose area the land is situated."

[82] Section 38(3) of the Act defines "development" to mean –

> "the carrying out of building, construction, engineering, mining or other operations on, under or over any land, and a material change to the existing use of any building or land without subdivision".

[83] It is evident from the above definition of "development" that KwaZulu-Natal PDA did not intend to regulate existing, lawful mining (or building, construction or engineering operations) but only those operations which involve a material change to the existing use of any building or land without subdivision. This is no doubt that in keeping with the general principle that statutes should not be construed as having a retrospective effect unless it is clear that the Legislature intended that result and furthermore, when the words "develop" and "development" are used in Chapter 4 of

S.S.D

the KwaZulu-Natal PDA,[27] it is evident that they are intended to refer to proposed developments and not intended to cover existing developments. That seems to appear from the references in the Chapter to persons who may "initiate the development of land",[28] the procedure that must be followed for the development of land and in particular what the "proposal for the development of land" may include,[29] the duties of the municipality in considering a "proposal" for the development of land,[30] the matters the municipality must take into account when considering the merits of a "proposal to develop land",[31] the discretion afforded to the municipality in deciding on the "proposed development of land"[32] and when and in what circumstances the right granted by the municipality for the development of land will lapse.[33] (My emphasis).

[84] The above interpretation is consistent with and accords with the ordinary meaning of the word "development" which means "the process of converting [land] to a new purpose by constructing buildings or making use of its resources".[34] I accordingly agree with Mr *Lazarus* that since Tendele was already conducting its mining operations at Somkhele at the time that the KwaZulu-Natal PDA came into operation on 1 May 2010 and at the time when the Act was assented to on 5 December 2008, it is apparent that its operations do not fall within the definition of "development" contained in section 38(3) and as such they do not require municipal consent to continue.

[85] As far as the Mtubatuba By-law is concerned, section 46 thereof provides that municipal approval is required for the undertaking of mining operations outside the area of a land use scheme. Section 46 of the By-law read with Schedule 3 defines a "mining operation" to mean:

> "the processing of any mineral as defined in section 1 of the Mineral and Petroleum Resources Developement Act on, in or under the earth, water or residue deposit, whether by underground or open workings or otherwise –

---

[27] Sections 38 – 49 which deal with the development of land situated outside the area of a scheme.
[28] Section 39(1).
[29] Section 40(1) and (2).
[30] Section 41.
[31] Section 42.
[32] Section 43(1).
[33] Section 49(1).
[34] *Oxford Dictionary of English*, 3ed, Oxford University Press.

S.S.D.

(a) if a mining right contemplated in section 22 of the Mineral and Petroleum Resources Development Act is required or has been granted for the operation, but processing has not commenced by 10 October 2008, or

(b) if a mining right has been granted in terms of a repealed law for the operation, but processing has not commenced by 10 October 2008."

[86] The operative date in the above definition is 10 October 2008. The factual position is that Tendele's mining operations which include "processing" (as defined in the MPRDA)[35] commenced in 2006 and as such do not fall within the definition of "mining operation" as contained in the Mtubatuba By-law. Additionally, the mining operations at Somkhele are recognised within the Mtubatuba's municipality's special development framework for the Mtubatuba municipal area ("Mtubatuba SDF"). There is no dispute that the Mtubatuba SDF is a principle strategic special planning instrument which guides and informs all planning, land and management, development and spatial decision-making by the municipality. In fact the Mtubatuba SDF recognises (a) that Somkhele's coal mining operations constitute an important economic base for the area and (b) that Somkhele will serve as a nucleus for further development and rural settlement in order to improve quality of life and access to services. In the circumstances it seems that Tendele's operations are being undertaken in accordance with all applicable land use planning tools and are expressly recognised in the Mtubatuba IDP as well as the SDF.

[87] As far as the Spatial Planning and Land Use Management Act 16 of 2013 (SPLUMA) is concerned, this Act came into effect on 1 July 2015. Section 26 of SPLUMA is titled "Legal effect of land use scheme". It provides in subsection 2 that land may be used only for the purposes permitted by a town planning scheme (until such scheme is replaced by a land use scheme) "or in terms of subsection (3)". Section 26 (3) provides for the continuation, after the commencement of SPLUMA, of certain land uses in certain circumstances. It provides that:

> "Where no town planning or land use scheme applies to a piece of land, before a land use scheme is approved in terms of this Act such land may be used only for the

[35] In terms of section 1 of the MPRDA, the word "processing", in relation to any mineral means the winning, extracting, concentrating, refining, calcining, classifying, crushing, screening, washing, reduction, smelting or gasification thereof.

S.S.D.

purposes listed in Schedule 2 to this Act and for which such land was lawfully used or could lawfully have been used immediately before the commencement of this Act."

[88] Schedule 2 of the SPLUMA includes in the list of land-use purposes "mining purposes" which are defined in the Schedule to mean "purposes normally or otherwise reasonably associated with the use of land for mining." It is evident that the purpose of section 26(3) is to maintain the existing land use regime applicable to land to which no town planning scheme or land use scheme applies for the period after SPLUMA. It seems to me that the only way it can achieve this is by allowing the use of land for certain purposes to continue where the land was lawfully being used for that purpose immediately before the commencement of SPLUMA on 1 July 2015. From a factual point of view Tendele's mining operations at Somkhele pre-dated the commencement of SPLUMA and were lawful at the time that SPLUMA commenced. As the applicants attorneys were informed by the respective municipalities, (Hlabisa and Mtubatuba), no municipal consent was required as no town planning scheme or land use scheme applies to land where mining operations are being conducted by Tendele. Accordingly, it seems that the continuation of mining operations is not in breach of the provisions of SPLUMA.

Issue of graves

[89] The case made out by the applicants is that Tendele has damaged, altered, exhumed and removed traditional graves from their original positions without the necessary written approval in terms of section 35 of the KZN Heritage Act. Section 35 reads as follows:

"35. **General protection**: Traditional burial places. - (1) No grave –

(a) not otherwise protected by this Act; and

(b) not located in a formal cemetery managed or administered by a local authority, may be damaged, altered, exhumed, removed from its original position, or otherwise disturbed without the prior written approval of the Council having been obtained on written application to the Council.

(2) The Council may only issue written approval once the Council is satisfied that–

(a) the applicant has made a concerted effort to consult with communities and individuals who by tradition may have an interest in the grave; and

S.S.D.

(b) the applicant and the relevant communities or individuals have reached agreement regarding the grave."

[90] The KZN Heritage Act defines "council" as being the AMAFA a KwaZulu-Natali Heritage Council (AMAFA) established in terms of section 5(1) of the KZN Heritage Act.

[91] In its answering affidavit Tendele has openly accepted that it has previously removed or altered traditional graves without being in possession of the necessary authorisations from AMAFA. It points out, however, that all relocations of traditional graves that have taken place have nevertheless occurred in consultation with the affected families and communities. It goes on to aver that in more recent times it has engaged in extensive consultations with AMAFA in an effort to ensure that its continued conduct in relation to traditional graves is wholly within the law. The process undertaken by Tendele in relation to the graves has been dealt with extensively by Mr *Du Preez* in sub-paragraphs 123.1 – 123.14 of the answering affidavit (none of which have been contested). I see no need to repeat same herein save to state that it is evident therefrom that whilst Tendele had, in the past, conducted relocations of traditional graves without the necessary authorisation from AMAFA, as soon as its omission was realised it began engaging with AMAFA on how to remedy the omission going forward.

[92] AMAFA has been cited in these proceedings as the ninth respondent. I have no doubt that it would have said something regarding Tendele's conduct if it was not satisfied with the manner in which traditional graves were being relocated in terms of the KZN Heritage Act. Mr Du Preez has pointed out in the answering affidavit that there has been a series of engagements and interactions between AMAFA and Tendele and that Tendele has repeated its undertaking that it will continue to work with AMAFA to ensure that any future relocations will comply with the letter and spirit of the law.

[93] In light of the above, I consider that on the uncontested facts in the answering affidavit, the applicants have simply failed to make out a proper case for an interdict. There are, in my view, no facts put up by the applicants that would justify any

S.S.D.

reasonable apprehension that Tendele will continue to relocate or exhume traditional graves without the appropriate statutory safeguards.

Waste Management Licences

[94] The applicants complain that Tendele's mining operations are unlawful as it does not have a waste management licence in respect of its activities as required under the Waste Act. Like NEMA the Waste Act is really environmental legislation sourced in terms of section 24 of the Constitution. The Waste Act (s 20) prohibits any person carrying on a waste management activity from doing so except in accordance with the standards set out in section 19(3) for that activity or in terms of a waste management licence issued in respect of that activity.

[95] "Waste" in terms of the Waste Act is defined to include all the waste included in schedule 3 to the Act. Schedule 3 includes:

(a) "hazardous waste" which includes residue stockpiles and Item 4 which includes the activity of the "Pyrolytic treatment of coal.";

(b) "residue stockpile" which includes the waste from a mining operation, and which include in Item 1, waste from mining.

[96] The applicants accordingly contend that section 20 read with the definition of "waste management activity" and the various categories of waste associate with mining operations requires a waste management licence.

[97] In paragraph 94 of their founding affidavit the applicants assert the following:

> "On the site of Tendele's mining there are massive stockpiles of waste rock and the production of coal sludge. This is known as slurry and is the liquid coal waste produced by coal mining activities. When the coal is crushed and washed this liquid waste is generated, along with the huge stockpiles of solid waste. Even the waste slurry water is toxic containing mercury. Arsenic, beryllium, cadmium, nickel and selenium."

[98] The applicants contend that Tendele's non-compliance in the respects set out above evidences proof that it is conducting mining operations in Reserve 3 illegally.

S.S.D.

[99] Tendele on the other hand avers first, that the applicants have failed in the founding papers to identify any aspect of Tendele's operations that would require a waste management licence and that this ground of alleged unlawfulness is unsustainable on the pleadings; and, second, that even if their pleadings were not defective, Tendele does not require a waste management licence to continue its operations at Somkhele.

[100] I consider that there is some merit in the case made out by Tendele for the reasons set out hereunder:

100.1 A "waste management activity" is defined as any activity listed in Schedule 1 or published by notice in the *Government Gazette* under section 19.[36]

100.2 Section 19 empowers the Minister by Notice in the *Gazette* to publish a list of waste management activities. On 29 November 2013 the Minister published the list of waste management activities that have or are likely to have a detrimental effect on the environment ("the 2013 listing notice")[37]

100.3 The 2013 listing notice contains transitional provisions the purpose of which are to regularise the affairs of persons who were in the process of conducting waste management activities at the time of publication of the listing notice.

100.4 Regulation 7(1) of the 2013 listing notice provides that:

> "A person who lawfully conducts a waste management activity listed in this Schedule on the date of the coming into effect of this Notice may continue with the waste management activity until such time that the Minister by notice in the *Gazette* calls upon such person to apply for a waste management licence."

[101] From the above it is apparent a person who was conducting a listed waste management activity lawfully as at 29 November 2013 (when the 2013 listing notice

---

[36] Section 1 of the Waste Act.
[37] National Environment Management: Waste Act, 2008 (Act No 59 of 2008) Regulations, GN R921, *GG* 37089, dated 29 November 2013.

S.S.D

came into effect) or on 24 July 2015 when the 2013 licence notice was amended to include activities related to residue stockpiles and residue deposits, is entitled to continue conducting such activity without a waste management licence until such time as they are called upon by the Minister by Notice in the *Gazette* to apply for such licence.

[102] I accordingly find that on the available evidence Tendele's mining operations at Somkhele were undertaken lawfully in terms of approved EMP's as already dealt with above. The Minister of Environmental Affairs has not yet called upon Tendele to apply for a waste management licence as provided for in regulation 7(1) of the 2013 listing notice (as amended on 24 July 2015). The Minister of Environmental Affairs has been cited as the fourth respondent in these proceedings. I have no doubt that he/she would have had something to say if it was found that Tendele was acting unlawfully.

***Maledu* judgment and parties' submissions**

[103] As I mentioned at the commencement of this judgment counsel were afforded an opportunity of making further submissions in light of the findings in *Maledu* and whether these have any material bearing on the issues in the present matter. Placing reliance on *Maledu* counsel for the applicants made the following submissions which I quote in full here below:

> "1. ....
>
> 2. The issues which arise in the judgment which are supportive of Applicants' case are the following:
>
> 2.1 The Members of Second Applicant and Third Applicant are Occupiers of Land whose tenure is legally insecure. The protection for such occupiers is confirmed in the Constitutional Court Judgment ("the Judgment") at paras 1 – 5.
>
> 2.2 In the Courts analysis of the MPRDA set out in paragraphs 50 to 59 the following findings are recorded:-
>
> 2.2.1 That Section 22 of the MPRDA provides that a person who wishes to apply for a mining right must simultaneously apply for an environmental approval (para 53).
>
> 2.2.2 A mining right holder is obliged to exercise his rights *civiliter modo* causing the least possible inconvenience (para 58 – 59).

S.S.D.

2.3 The importance of the notification and consultation with affected parties was emphasized with reference to the Bengwenyama Minerals case at paragraphs 78 – 81. A fundamental part of the EIA process under NEMA is the consultation process.

2.4 Usually a mining right is a limited real right on the land to which the right relate. It usually only grants the right-holder access to the land. Where the nature of the mining right is invasive (it is submitted that open cast mining is totally invasive) it would intrude totally on the rights of the occupier. In these circumstances the mining-right holder must comply with IPILRA (The Interim Protection of Informal Rights Act 31 of 1996) (Paragraph 101 – 105).

2.5 Similarly, a mining-rights holder must comply with all applicable law which has a bearing on the right, such as planning or zoning law which requires Land Use permission (paragraph 106). This issue was fully argued in the instant case with regard to SPLUMA, the PDA, the AMAFA Act, the Waste Act and NEMA.

2.6 It is also inherent that the actual occupiers must be consulted and deals may not be made on their behalf with Traditional Leaders. (Paragraph 22 and 108).

3. It is submitted that these aspects covered in the judgment support Applicants' case."

[104] I pointed out already that the *Maledu* matter dealt primarily with two competing rights in the context of evictions. The competing rights were those of holders of informal rights to land to occupy and enjoy their land on the one hand and on the other the rights of the holder of mining rights issued in terms of the MPRDA to mine on the same land. The issue thus arose in the context of an interdict application in which the holders of the mining right sought to evict the holders of informal rights to land from their land for mining purposes. The judgment turned largely on the interpretation of section 54 of the MPRDA which the court held provides a mechanism for the resolution of these competing rights, which mechanism must first be exhausted before recourse is had to the courts.

[105] In the present matter the primary issue is whether Tendele had the necessary statutory authorisations to conduct mining operations at Somkhele. Just to recap: the

S.S.D.

applicants' complaints were that Tendele had no environmental authorisation in terms of NEMA, no land-use authorisation from any municipality having jurisdiction, no waste management licence and no written approval to damage, alter, exhume or remove any traditional graves in terms of the KZN Heritage Act. The applicants according sought an interdict in the terms set out above. The role and interpretation of s 54 of the MPRDA was never raised in this matter and accordingly plays no role in the relief sought by the applicants.

[106] I agree fully with the submissions advanced by Mr *Lazarus* on behalf of Tendele that *Maledu* has no direct relevance to the issues that arose in the present matter. From what follows it becomes abundantly clear that the applicants' reliance on the findings in *Maledu* is not only misplaced but is rather opportunistic:

106.1 In paragraph 2.1 of the applicants' submissions, the applicants point out that the members of the second and third applicants are occupiers of land whose tenure is legally insecure and the Constitutional Court has now confirmed the need to protect such occupiers. This issue was never in dispute in the present matter. As mentioned above, the applicants sought to interdict Tendele from mining at the Somkhele mine on the basis that Tendele was allegedly mining without the requisite statutory authorisations. The applicants did not allege that Tendele deprived them of their informal rights to land. No such relief was sought against Tendele.

106.2 In paragraph 2.2.1 of their submissions, the applicants refer to the Constitutional Court's discussion of section 22 of the MPRDA which provides, amongst others, that any person who wishes to apply for a mining right must simultaneously apply for an environmental approval. The applicants do not elaborate on how this referral supports their case. As dealt with in this judgment, the requirement to apply for and be granted an environmental authorisation prior to the grant of a mining right was introduced into the MPRDA on 8 December 2014 with the introduction of the One Environmental System. The legislative amendments provide for, *inter alia*, the continuation of mining operations lawfully conducted prior to the amendments. The effect of the transitional arrangements is that Tendele's EMPs are deemed to

S.S.D.

constitute sufficient authorisation for its current mining operations and a separate environmental authorisation in terms of NEMA is not required.

106.3 In paragraph 2.2.2 of their submissions, the applicants refer to the Constitutional Court's observation that a mining right holder is obliged to exercise his rights *civiliter modo*, causing the least possible inconvenience. The relevance of the Constitutional Court's observation of this principle to the present matter is unclear as there are no allegations in the applicants' papers that Tendele is not mining *civiliter modo* and no relief is sought by the applicants in this regard. In particular, the applicants' case is that Tendele is mining unlawfully not that it is mining unreasonably.

106.4 In paragraph 2.3 of their submissions, the applicants refer to the Constitutional Court's emphasis on the importance of notification and consultations with affected parties in the grant and exercise of mining rights. Once again, the relevance of this aspect of the Constitutional Court's judgment to the present matter is unclear as none of the relief sought by the applicants is based on any allegation that Tendele did not notify and consult with the applicants or any other affected parties in its application for its mining rights or in its exercise thereof.

106.5 In this regard I must point out that there is not a single reference either in the applicants papers or in their heads of argument to the issue of "consultations" with affected parties as they now seem to be relying on. In fact they allege no breach of the requirements as prescribed either in s 10 or s 22(4)(b) of the MPRDA (2002) in this regard. Neither in their heads of argument nor in oral submissions did the applicants counsel refer to the principles set out in the matter of *Bengwenyama Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd* [2010] ZACC 26; 2011 (4) SA 113 (CC); 2011 (3) BCLR 229 (CC) at para 63, relating to consultations with interested and affected parties. The closest that the applicants ever got to the issue of "consultations" was in argument when the words "public participation" were used by Mr Dickson in relation to the 2016 mining rights granted to Tendele.

S.S.D.

106.6 In paragraph 2.4 of their submissions, the applicants refer to the Constitutional Court's findings in regard to the Interim Protection of Informal Land Rights Act, 1996 ("**IPILRA**"). There are no allegations in regard to IPILRA in the applicants' papers and the applicants do not seek any relief based on their rights in terms of IPILRA. Consequently, the reference to this aspect of the Constitutional Court's judgment is unclear in the context of the present matter.

106.7 In paragraph 2.5 of their submissions, the applicants refer to the Constitutional Court's confirmation of the principle that a mining right holder must comply with all applicable law which has a bearing on the right "*such as planning or zoning law which requires Land Use permission.*" This issue, the applicants allege "*was fully argued in the instant case with regard to SPLUMA, the PDA, the AMAFA Act, the Waste Act and NEMA.*" At no stage ever did Tendele dispute that it was required to comply with all applicable laws which have a bearing on its mining rights. In regard to the applicants' contention that Tendele's mining operations are unlawful because it has no land-use permission from any municipality having jurisdiction, I have found that Tendele's mining operations pre-date the introduction of mining as a land use requiring municipal approval.

Conclusion

[107] Based on the findings made above, I conclude that the applicants have failed to make out a proper case for the relief as claimed or for such other relief as was contended for on their behalf. The applicants have simply failed to put up cogent evidence to support their contentions that Tendele is mining unlawfully and without the requisite authorisations, environmental or otherwise. The various statutes relied on by the applicants create regulatory authorities who are empowered to enforce compliance with the statutes they administer. The applicants have not afforded the authorities concerned the opportunity to fully investigate their complaints before deciding to institute these proceedings. It is one thing to allege a statutory breach, it is quite another to provide proof of non-compliance. The allegations relied on by the applicants were, in my view, rather vague, generalised and unsubstantiated. This was the first problem that the applicants faced.

S.S.D.

[108] The second is that some of the statutes they rely on contain transitional provisions and a range of adequate alternative remedies available to address their complaints. Examples of such remedies are for instance to be found in the following provisions:

108.1 Section 28 of NEMA empowers the Directors General of the Department of Environmental Affairs, the Department of Mineral Resources and a provincial head of department to direct a person causing significant pollution or degradation of the environment to cease such conduct. Section 28(12) of NEMA provides that any person may, after giving notice, apply to a competent court for an order directing the Directors General or provincial heads of departments to take any of the steps listed in s 28(4). There is no evidence that the applicants sought to make use of any of these remedial measures or to engage meaningfully with the relevant authorities about Tendele's alleged contraventions and what remedies could be applied.

108.2 The applicants complain that Tendele has never obtained municipal permission to conduct mining or to use the land for mining purposed. However, section 75 of the KwaZulu-Natal PDA provides that developing land contrary to a land use scheme or without prior approval is an offence. The remedy for the commission of such an offence is the service by the municipality of a contravention notice in terms of section 80. The municipality is required to serve such notice if there are reasonable grounds to suspect that a person is guilty of such an offence. If the contravention notice does not result in compliance, the municipality would be required in terms of section 81(2) to serve a prohibition order restraining the illegal activity. The applicants have clearly not attempted to compel the relevant municipalities to invoke these provisions.

108.3 The applicants complain that Tendele has no written approval from AMAFA in terms of section 35 of the KwaZulu-Natal Heritage Act to damage, alter, exhume or remove any traditional graves from their original position. In terms of section 6 AMAFA is empowered to identify, conserve and protect the heritage resources of the province. In terms of section 7(b)(iii) AMAFA is

S.S.D

required to provide for and facilitate community and stakeholder involvement in heritage matters. AMAFA remains the body responsible in the province for issuing approvals in terms of section 35 relating to the alteration, exhumation and removal of traditional graves. There is no evidence from the applicants' side to show that they have engaged with AMAFA about their remedial measures relating to traditional graves. The applicants complaints about traditional graves relates to Tendele's historical conduct in relation thereto which as I said Tendele has openly admitted to. As I have pointed out Tendele now works closely with AMAFA and the affected families to ensure that any relocation of traditional graves take place in accordance with the law.

[109] All in all, I consider that the applicants have not made out a proper case for an interdict. They seem to have adopted a "scatter gun approach" hoping to hit one target or another. As I said their reliance now on the *Maledu* judgment is rather opportunistic given the fact that none of the issues dealt with in that judgment were either raised or dealt with by the applicants in their papers or in argument. It follows that the only appropriate order to be made in this matter is one dismissing the application. As far as the issue of costs are concerned I see no reason why costs should not follow the result.

Order

[110] In the result I make the following order:

The application is dismissed with costs, such costs are to be paid by the applicants jointly and severally and are to include the costs of two (2) Counsel.

SEEGOBIN J

S.S.D

COUNSEL FOR THE APPLICANTS:	.A Dickson SC with Ms Mazibuko (Instructed by Youens Attorneys, c/o Hay Scott Attorneys)
COUNSEL FOR THE RESPONDENTS:	Mr Lazarus SC with Mr Ferreira (Instructed by Malanscholes Attorneys)
COUNSEL FOR AMICI:	Mr D Sibiyi (Instructed by DMS Attorneys, c/o Shepstone & Wylie Attorneys)
DATE OF HEARING:	24 August 2018
DATE OF JUDGMENT:	20 October 2018

S.S.D.

"SD2"

IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG

CASE NO: 11488/17P

In the matter between:

GLOBAL ENVIRONMENTAL TRUST	First Applicant
MFOLOZI COMMUNITY ENVIRONMENTAL JUSTICE ORGANISATION	Second Applicant
SABELO DUMISANI DLADLA	Third Applicant

and

TENDELE COAL MINING (PTY) LTD	First Respondent
MINISTER OF MINERALS AND ENERGY	Second Respondent
MEC: DEPARTMENT OF ECONOMIC DEVELOPMENT, TOURISM AND ENVIRONMENTAL AFFAIRS	Third Respondent
MINISTER OF ENVIRONMENTAL AFFAIRS	Fourth Respondent
MTUBATUBA MUNICIPALITY	Fifth Respondent
HLABISA MUNICIPALITY	Sixth Respondent
INGONYAMA TRUST	Seventh Respondent
EZEMVELO KZN WILDLIFE	Eighth Respondent
AMAFA AKWAZULU-NATALI HERITAGE COUNCIL	Ninth Respondent

Coram: Seegobin J

S.S.D.

ORDER

(a) The Centre for Environmental Rights is granted leave to intervene in these proceedings as *amicus curiae.*

(b) The applicants and the Centre for Environmental Rights are granted leave to appeal to the Supreme Court of Appeal.

(c) The costs of the application for leave to appeal will be costs in the appeal.

JUDGMENT ON APPLICATION FOR LEAVE TO APPEAL

Seegobin J

[1] On 20 November 2018 and in terms of a written judgment I dismissed the applicant's application with costs and ordered that such costs should include the costs of two counsel. This is an application for leave to appeal against the whole of the judgment and order.

[2] In this application the applicants are now represented by Mr Ngcukaitobi and Ms Mazibuko. Mr Lazarus SC continues to represent the first respondent ('Tendele'). A new party known as the Centre for Environmental Rights ('CER') now wishes to be admitted as an *amicus curiae*. CER is represented by Mr du Plessis together with Ms Palmer and Ms Lushaba.

[3] At the outset I mention that Mr Lazarus, both in his written argument and in oral submissions, effectively abandoned the costs order made against the applicants as referred to above.

[4] The present application was pursued in terms of s 17 of the Superior Courts Act 10 of 2012 (the Act), the relevant parts of which provide that:

> '17 (1) Leave to appeal may only be granted where the Judge or Judges concerned are of the opinion that:
>
> (a) (i) the appeal would have a reasonable prospect of success; or
> (ii) there is some other compelling reason why the appeal should be heard, including the conflicting judgments under consideration;
>
> (b) ...
>
> (c) ...
>
> (d) ...'

[5] With regard to the word 'would' in sub-section 17(1)(a)(i) above, the Supreme Court of Appeal has found that the use of the word in the section imposes a more stringent threshold in terms of the Act, compared to the provisions of the repealed Supreme Court Act 59 of 1959. See *Notshokovu v S* [2016] ZASCA 112 at (2). In *Acting National Director of Public Prosecutions and Others v Democratic Alliance in Re: Democratic Alliance v Acting National Director of Public Prosecutions and Others* [2016] ZAGPPHC 489 at (25) the court endorsed the notion of a higher threshold stating: 'The Superior Courts Act has raised the bar for granting leave to appeal.' In *The Mont Chevaux Trust [IT2012/28) v Tina Goosen & 18 Others* [LCC14R/2014, an unreported judgment from the Land Claims Court], Bertelsmann J held that:

> 'It is clear that the threshold for granting leave to appeal against a judgment of a High Court has been raised in the new Act. The former test whether leave to appeal should be granted was a reasonable prospect that another court might come to a different conclusion. See *Van Heerden v Cronwright & Others* 1985 (2) SA 342 (T) at 343H. The use of the word "would" in the new statute indicates a measure of certainty that another court will differ from the court whose judgment is sought to be appealed against.'
>
> [my emphasis]

[6] The main application before me was essentially one for an interdict. The applicants sought an order stopping Tendele from carrying out any mining activities

at Somkele in northern KwaZulu-Natal. The applicants' case was that Tendele's current mining operations are unlawful in that it:

> 6.1 has no environmental authorisation issued in terms of section 24 of the National Environmental Management Act 107 of 1998 ("NEMA");
> 6.2 has no land use authority, approval or permission from any municipality having jurisdiction;
> 6.3 has no waste management licence issued in terms of section 43 of the National Environmental Management: Waste Act 59 of 2008 ('Waste Act'); and
> 6.4 has no written approval in terms of section 35 of the KwaZulu-Natal Heritage Act 4 of 2008 ('KZN Heritage Act') to damage, alter, exhume or remove any traditional graves from their original position.

[7] I immediately point out that the applicants' case was very poorly pleaded on the papers. This much was fairly and properly conceded by Mr Nqukaitobi in the present application. The applicants had simply failed to make out a proper case for an interdict in their founding papers. I considered that the factual allegations relied on were, for the most part, incorrect and unsubstantiated. The application was accordingly dismissed for the reasons set out in the judgment.

[8] Despite the difficulties in the papers and my misgivings about the applicants' prospects, I have listened intently to the submissions advanced by all counsel in the present application. In view of the various pieces of legislation involved as well as issues of interpretation and questions of legality that may arise I am persuaded that an appeal would have reasonable prospects of success. I also consider that it may also be in the public interest to have some finality on the issues raised by the applicants. For these reasons I am persuaded that leave to appeal should be granted.

Order

[9] In the result, I make the following order:

S.S.D.

(a) The Centre for Environmental Rights is granted leave to intervene in these proceedings as *amicus curiae.*

(b) The applicants and the Centre for Environmental Rights are granted leave to appeal to the Supreme Court of Appeal.

(c) The costs of the application for leave to appeal will be costs in the appeal.

Seegobin J

APPEARANCES:

COUNSEL FOR THE APPLICANT:	T Ngcukaitobi with Ms Mazibuko (instructed by Youens Attorneys)
COUNSEL FOR THE RESPONDENTS:	P Lazarus SC (instructed by Malan Scholes Inc)
COUNSEL FOR THE *AMICUS CURIAE*:	M du Plessis SC with T Palmer & S Lushaba (instructed by c/o Austen Smith Attorneys)
DATE OF HEARING:	11 September 2019
DATE OF JUDGMENT:	17 September 2019

S.S.D.

THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable/Not reportable

Case No: 1105/2019

In the matter between:

GLOBAL ENVIRONMENTAL TRUST	**FIRST APPELLANT**
MFOLOZI COMMUNITY ENVIRONMENTAL JUSTICE ORGANISATION	**SECOND APPELLANT**
SABELO DUMISANI DLADLA	**THIRD APPELLANT**
and	
TENDELE COAL MINING (PTY) LTD	**FIRST RESPONDENT**
MINISTER OF MINERALS AND ENERGY	**SECOND RESPONDENT**
MEC: DEPARTMENT OF ECONOMIC DEVELOPMENT, TOURISM AND ENVIRONMENTAL AFFAIRS	**THIRD RESPONDENT**
MINISTER OF ENVIRONMENTAL AFFAIRS	**FOURTH RESPONDENT**
MTUBATUBA MUNICIPALITY	**FIFTH RESPONDENT**
HLABISA MINICIPALITY	**SIXTH RESPONDENT**
INGONYAMA TRUST	**SEVENTH RESPONDENT**
EZEMVELO KZN WILDLIFE	**EIGHTH RESPONDENT**
AMAFA AKWAZULU-NATALI HERITAGE COUNCIL	**NINTH RESPONDENT**
CENTRE FOR ENVIRONMENTAL RIGHTS	**AMICUS CURIAE**

S.S.D

MPUKUNYONI TRADITIONAL COUNCIL	**AMICUS CURIAE**
MPUKUNYONI COMMUNITY MINING FORUM	**AMICUS CURIAE**
THE ASSOCIATION OF MINE WORKERS AND CONSTRUCTION UNION	**AMICUS CURIAE**
THE NATIONAL UNION OF MINEWORKERS	**AMICUS CURIAE**

Neutral citation: *Global Environmental Trust and Others v Tendele Coal Mining (Pty) Ltd and Others* (1105/2019) [2021] ZASCA 13 (09 February 2021)

Coram: PONNAN, SCHIPPERS, PLASKET AND NICHOLLS JJA AND LEDWABA AJA

Heard: 03 November 2020

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email. It has been published on the Supreme Court of Appeal website and released to SAFLII. The date and time of hand-down is deemed to be 10H00 on 09 February 2021.

Summary: Interdict to stop coal mining – interpretation of statutes – National Environmental Management Act 107 of 1998 (NEMA) – environmental authorisation to undertake listed activity under s 24 – whether required by holder of mining right and environmental management programme in terms of the Mineral and Petroleum Resources Development Act 28 of 2002 – no case made out for interdict in founding papers – municipal approval of land use – Spatial Planning and Land Use Management Act 16 of 2013, KwaZulu-Natal Planning and Development Act 6 of 2008 and Mtubatuba Local Municipality Spatial Planning and Land Use Management By-Law, 2017 – not required by virtue of transitional arrangements – National Environmental Management Waste Act 59 of 2008 – waste management licence not required by reason of transitional

provision – non-compliance with the KwaZulu-Natal Heritage Act 4 of 2008 – relocation of ancestral graves – no reasonable apprehension of harm – interdict refused.

ORDER

On appeal from: KwaZulu-Natal Division of the High Court, Pietermaritzburg (Seegobin J sitting as court of first instance): judgment reported *sub nom Global Environmental Trust and Others v Tendele Coal Mining (Pty) Ltd and Others* [2019] 1 All SA 176 (KZP).

The appeal is dismissed.

JUDGMENT

Schippers JA:

[1] The central issue in this appeal is whether the first respondent, Tendele Coal Mining (Pty) Ltd (Tendele), is mining without the necessary statutory authorisations and approvals. The matter arises from an unsuccessful application by the appellants in the KwaZulu-Natal Division of the High Court, Pietermaritzburg (the high court), to interdict Tendele from continuing with any mining operations at its Somkhele Mine in Mtubatuba, KwaZulu-Natal (the mine). The appeal is with the leave of the high court.

[2] The first appellant is Global Environmental Trust, established inter alia to preserve the planet and its natural resources. The second appellant, Mfolozi Community Environmental Justice Organisation, is a not-for-profit organisation,

whose objects include the implementation of environmentally sustainable projects for the Fuleni community in northern KwaZulu-Natal (KZN). The third appellant and main deponent to the founding papers, Mr Sabelo Dumisani Dladla, an Eco-tourism Management student who lives in Nlolokotho, near the mine, withdrew from this appeal on 29 October 2020. Tendele consented to the withdrawal of the appeal and seeks no order for costs. In what follows I refer to the first and second appellants as 'the appellants'.

[3] The *amici curiae* represented in the appeal are the Centre for Environmental Rights (CER) and as a group, Mpukunyoni Traditional Council, Mpukunyoni Community Mining Forum, the Association of Mine Workers and Construction Union and the National Union of Mineworkers (the Mpukunyoni *amici*). The CER, in its written and oral submissions, contended that the high court erred in its interpretation of the relevant statutory provisions, and in ordering the appellants to pay Tendele's costs. The Mpukunyoni *amici* submitted that the orders sought by the appellants, if granted, would ultimately lead to the closure of the mine which, in turn, would have disastrous effects on neighbouring communities.

Facts

[4] The basic facts can be shortly stated. The mine has one of the largest resources of open-pit mineable anthracite reserves in South Africa and is the principal supplier of anthracite to ferrochrome producers in the country. Ferrochrome is an essential component in the production of stainless steel. South Africa is one of the largest producers of ferrochrome in the world, second only to China. Tendele began mining operations in 2006 pursuant to the grant of an 'old order' mining licence and subsequently a mining right, and the approval of an Environmental Management Programme (EMP) under the Mineral and Petroleum Resources Development Act 28 of 2002 (MPRDA).

[5] The mine comprises a single mining area on Reserve No 3 (Somkhele) No 15822 (Reserve No 3). However, the mining operations are divided between five areas and separate mining rights and separate EMPs apply to the different areas. The Area 1 mining right was granted to Tendele on 21 May 2007 and the EMP applicable to that mining right, approved on 22 June 2007 by the former Department of Mineral Resources (DMR). The Areas 2 and 3 converted mining right was granted to Tendele on 1 February 2011. On 8 March 2013 this right was amended to include the KwaQubuka and Luhlanga areas. The EMP applicable to the Areas 2 and 3 converted mining right was approved on 30 March 2011. Amendments to this EMP to cater for the inclusion of the KwaQubuka and Luhlanga areas, were approved on 29 May 2012. The mining right in respect of Areas 4 and 5 was granted on 31 May 2016. The EMP applicable to this right was approved on 26 October 2016.

[6] Tendele is actively mining only in Area 1 and the extended area of Area 2, namely the KwaQubuka and Luhlanga areas. The mine's coal wash plants are located in Area 2. No mining operations are conducted in Area 3. Mining in Area 2 ceased in January 2012 due to depletion of anthracite reserves. Mining operations have not commenced in Areas 4 and 5.

[7] In October 2017 the appellants sought an interdict to prevent Tendele from carrying on with any mining operations in the following areas: Area 1 as described in the mining right dated 22 June 2007; Areas 2 and 3 described in the mining right dated 30 March 2011; the KwaQubuka and Luhlanga areas described in an amendment to the mining right dated 8 March 2013; and a part of the Remainder of Reserve No 3 No 15822, in extent 21 233.0525 hectares, described in the mining right dated 26 October 2016.

[8] The interdict was sought on the basis that Tendele was 'non-compliant in respect of the permits or approvals required' in relation to mining, environmental authorisation, land use, interference with graves and waste management. More specifically, the appellants alleged that Tendele has no environmental authorisation issued in terms of s 24(2) of the National Environmental Management Act 107 of 1998 (NEMA) to conduct mining operations. Tendele has no authority, approval or permission from a municipality to use land for mining operations. Tendele has no written approval in terms of s 35 of the KwaZulu-Natal Heritage Act 4 of 2008 (the KZN Heritage Act) to damage, alter or exhume traditional graves. Tendele does not have a waste management licence issued by the fourth respondent, the Minister of Environmental Affairs (the Environment Minister), under s 43(1) of the National Environmental Management: Waste Act 9 of 2008 (the Waste Act), or by the second respondent, the Minister of Minerals and Energy (the Mining Minister), in terms of s 43(1A) of the Waste Act.

[9] Tendele opposed the application for an interdict, essentially on the following grounds. Tendele's mining operations are undertaken in terms of valid mining rights and EMPs under the MPRDA. The legislative amendments introduced with effect from 8 December 2014, that gave effect to the so-called 'One Environmental System', in terms of which the holder of a mining right is required to have environmental authorisation for its operations, contain transitional arrangements for the continuation of mining operations lawfully conducted prior to those amendments. In terms of the One Environmental System, all the environmental aspects of mining are regulated through NEMA and all environmental provisions are repealed from the MPRDA.[1] The mine operates

[1] *Minister of Mineral Resources v Stern and Others; Treasure the Karoo Action Group and Another v Department of Mineral Resources and Others* [2019] ZASCA 99; [2019] 3 All SA 684 (SCA) para 21. The One Environmental System is expressly recognised in s 50A(2) of NEMA, which provides:

S.S.D

lawfully, in compliance with the relevant land-use planning laws. The waste management activities by Tendele are authorised in terms of the transitional provisions of the Waste Act, which provide for the continuation of such activities lawfully undertaken prior to the amendment on 29 November 2013, of the list of waste management activities that have a detrimental effect on the environment.

[10] Tendele accepted that it had previously removed or altered traditional graves without the necessary authorisation, but asserted that it did so after consultation with the families concerned. Since 2017 it has been working in collaboration with the ninth respondent, AMAFA aKwaZulu-Natali Heritage Council (AMAFA Heritage Council), and a comprehensive procedure for future relocation of graves has been established.

[11] The high court (Seegobin J) dismissed the application with costs. Its main findings may be summarised as follows. The appellants failed to establish a proper cause of action: they did not identify precisely the activities undertaken by Tendele without the necessary environmental authorisation. Prior to the coming into force of the One Environmental System on 8 December 2014, the environmental impacts of mining were regulated exclusively under the MPRDA in terms of approved EMPs. Section 12(4) of the National Environmental Management Amendment Act 62 of 2008 (the 2008 NEMA Amendment Act),

---

'Agreement for the purpose of subsection (1) means the agreement reached between the [Environment] Minister, the Minister responsible for water affairs and the Minister responsible for mineral resources titled ***One Environmental System*** for the country with respect to mining, which entails–

(a) that all environment -related aspects would be regulated through one environmental system which is the principal Act [NEMA] and that all environmental provisions would be repealed from the Mineral and Petroleum Resources Development Act, 2002;

(b) that the Minister sets the regulatory framework and norms and standards, and that the Minister responsible for Mineral Resources will implement provisions of the principal Act and the subordinate legislation as far as it relates to prospecting, exploration, mining or operations;

(c) that the Minister responsible for Mineral Resources will issue environmental authorisations in terms of the principal Act for prospecting, exploration, mining or operations, and that the Minister will be the appeal authority for these authorisations; and

(d) that the Minister, the Minister responsible for Mineral Resources and the Minister responsible for Water Affairs agree on fixed time-frames for the consideration and issuing of the authorisations in their respective legislation and agreed to synchronise the time-frames.'

which provides that an EMP approved under the MPRDA must be regarded as having been approved in terms of NEMA, has the status of an environmental authorisation under NEMA. The purpose of this transitional provision was to allow the holder of an EMP lawfully conducting mining operations as at 8 December 2014, to continue to do so after that date. This interpretation is supported by the presumption against the retrospective operation of statutes.

[12] The high the court concluded that the Mining Minister was satisfied with Tendele's EMPs and the manner in which it conducted its mining operations, because no action had been taken against Tendele in terms of s 12(5) of the 2008 NEMA Amendment Act. This provision states that if the Mining Minister is of the opinion that mining operations are likely to result in unacceptable pollution, ecological degradation or damage to the environment, the Minister may direct the holder of a mining right to take action to upgrade an EMP to address the deficiencies. In terms of s 24L(4) of NEMA, a competent authority empowered under Chapter 5 to issue an environmental authorisation (the Mining Minister), may regard 'an authorisation in terms of any other legislation' that meets all the requirements stipulated in s 24(4), as an environmental authorisation in terms of Chapter 5. Tendele's EMPs constitute authorisations in terms of any other legislation.

[13] The high court held that the laws relating to land use, requiring authority, approval or permission from the relevant municipality, do not apply to Tendele, whose mining operations predate the coming into force of those laws. Tendele does not require a waste management licence under the Waste Act since it was lawfully conducting mining operations in terms of approved EMPs. The appellants were not entitled to an interdict, since they failed to establish a reasonable apprehension that Tendele would exhume or relocate traditional graves without the necessary statutory safeguards.

S.S.D

Environmental authorisation

[14] The issue on this part of the case, is whether Tendele requires, in addition to a mining right and an EMP in terms of the MPRDA, environmental authorisation under NEMA for activities incidental to mining, specified as 'listed activities' in the relevant environmental impact assessment (EIA) regulations. Section 24F(1)*(a)* of NEMA prohibits the commencement of 'listed activities' without environmental authorisation. Listed activities are those identified in terms of ss 24(2)*(a)* and 24(2)*(d)* of NEMA.

[15] Acting in terms of s 24(2)*(a)* of NEMA (and its predecessor, s 21 of the Environment Conservation Act 73 of 1989 (ECA)) the Environment Minister has identified numerous listed activities requiring environmental authorisation. Since the first list of activities was published on 5 September 1997 in terms of the ECA,[2] until the most recent list published on 4 December 2014 under NEMA,[3] there have been amendments and additions to, and removal and replacement of, listed activities in the EIA regulations.

No proper cause of action?

[16] The appellants alleged that normally, mining is a listed activity which has an impact on the environment and thus requires environmental authorisation in terms of NEMA. However, they did not identify the listed activities that Tendele allegedly commenced without environmental authorisation, nor the date on which those activities commenced. Counsel for Tendele submitted that this was fatal to

[2] 'The Identification under Section 21 of Activities which may have a Substantial Detrimental Effect on the Environment GN R1182, *GG* 18261, 5 September 1997' (as amended).
[3] 'List of Activities and Competent Authorities Identified in terms of Sections 24(2) and 24D GN R983, 984 and 985, *GG* 38282, 4 December 2014' (as amended).

S.S.D

their case, with the result that the issue as to the proper interpretation of the MPRDA and NEMA concerning an environmental authorisation contemplated in NEMA, did not arise on the founding papers. This submission is unsound, for the reasons advanced below.

[17] First, there is nothing in the answering affidavit that even suggests that the application should be dismissed because the appellants failed to state the listed activities conducted by Tendele without environmental authorisation. Neither did Tendele oppose the application on the basis that it was not engaged in any listed activity. Instead, Tendele's sole defence was that no environmental authorisation under NEMA was necessary because its mining operations were conducted in terms of its mining rights and EMPs issued under the MPRDA.

[18] What crystallised as the main issue between the parties, is easily explained in the light of the facts leading up to the application, set out in the founding affidavit. In June 2017 the appellants' attorney wrote to the DMR and the Department of Environmental Affairs (DEA), stating that Tendele was conducting activities listed in the EIA Regulations Listing Notices (no details were given), and requesting a copy of all environmental authorisations issued to Tendele, together with supporting documentation. The DMR replied that the EMPs issued under the MPRDA were deemed to be EMPs issued under NEMA, and that any environmental authorisations issued by the DEA was in the process of being transferred to the DMR for monitoring and compliance.

[19] It turned out that Tendele has no environmental authorisation in terms of NEMA to conduct any listed activity. Indeed, this is common ground. Its approach throughout was that it did not require environmental authorisation because the environmental impacts of mining were regulated exclusively by the MPRDA in terms of approved EMPs. In June 2017 Tendele issued a public

S.D.

statement that according to the statutory framework that governed mining in South Africa, the ECA and NEMA did not apply to mining operations at the relevant time.

[20] The appellants therefore approached the high court, claiming that Tendele is mining unlawfully because it has no environmental authorisation in terms of s 24 of NEMA. Unsurprisingly, the founding affidavit states that this is 'common cause from the correspondence'; and the high court noted that whether Tendele was required to obtain environmental authorisation under s 24, was an issue for determination. The facts thus show that the appellants had no reason to anticipate any dispute as to whether Tendele's mining operations triggered any listed activity. This is buttressed by the fact that Tendele at no stage, raised such dispute. Had Tendele denied that its mining operations triggered any listed activities, the appellants could have dealt with such denial in their founding or replying papers.

[21] There was accordingly no dispute between the parties as to whether Tendele was conducting listed activities. Solely for these reasons, Tendele's argument has no merit: it is opportunistic and contrived. But even if there was any dispute of fact as to whether Tendele's mining operations included listed activities, it should be resolved against Tendele. As this Court stated in *Wightman*:[4]

'When the facts averred are such that the disputing party must necessarily possess knowledge of them and be able to provide an answer (or countervailing evidence) if they be not true or accurate but, instead of doing so, rests his case on a bare or ambiguous denial the court will generally have difficulty in finding that the test [for the resolution of factual disputes in motion proceedings] is satisfied . . . If that does not happen it should come as no surprise that the court takes a robust view of the matter.'

[4] *Wightman t/a J W Construction v Headfour (Pty) Ltd and Another* [2008] ZASCA 6; 2008 (3) SA 371 (SCA) para 13.

S.S.D

[22] Secondly, Seegobin J, dealing with environmental authorisations and listing notices prior to the amendments which came into effect on 8 December 2014, said this:

'It seems that prior to 8 December 2014 mining per se was not a listed activity, however anyone intending to embark on mining would of necessity have to perform certain activities which were listed activities (e.g. establishing infrastructure for bulk transportation of water; facilities for the storage of fuel; clearing indigenous vegetation covering more than 1 hectare, etc) and would therefore have required environmental authorisation for those activities in terms of s 24.'

[23] This is a dictum by Rogers J in *Mineral Sands Resources*,[5] which in my view is correct. Given that mining inevitably involves the performance of listed activities, the high court's criticism that the founding affidavit 'does not go far enough to establish a proper cause of action', is baffling.

[24] Thirdly, the inescapable inference to be drawn from the facts in the papers, and the nature and extent of Tendele's mining operations (according to the answering affidavit, 'Somkhele has one of the largest resources of open-pit mineable anthracite reserves in South Africa'), is that Tendele conducts listed activities as contemplated in the EIA listing notices. Open pit mining of necessity involves clearing indigenous vegetation covering more than one hectare. The answering affidavit states that Tendele has not yet commenced mining operations in Areas 4 and 5 – comprising 21 233 hectares (more than 200 km²) and some ten times larger than the areas covered by the other mining rights combined.

[25] Further, Tendele conducts conventional truck and shovel mining operations using explosives, and it utilises water in bulk supply at its coal washing plants

[5] *Mineral Sands Resources (Pty) Ltd v Magistrate for the District of Vredendal, Kroutz NO and others* [2017] 2 All SA 599 (WCC) para 8.

S.S.D

located in Area 2. As stated in the affidavit of the Mpukunyoni *amici*, and as Tendele's main deponent, Mr Jan du Preez, must know, an investment for the establishment for a third wash plant, which would add an additional 400 000 tonnes of saleable energy product to the 1.2 million tonnes of anthracite produced per annum, has been approved. Environmental authorisation is required for the establishment of facilities for the storage of fuel; infrastructure for the bulk transportation of water; and buildings and structures for the storage of explosives.

[26] Finally, the question whether Tendele is mining unlawfully because it has no environmental authorisation in terms of s 24 of NEMA was squarely raised on the papers. This question is specifically relevant to the mining right granted to Tendele in 2016, which covers Areas 4 and 5 where mining has not yet commenced. The answering affidavit states that even after the introduction of the One Environmental System in 2014, which requires the holder of a mining right to obtain environmental authorisation under NEMA, this does not apply to Tendele whose mining operations remain lawful by virtue of transitional arrangements.

[27] For these reasons, I am unable to agree with the high court's criticism that the appellants failed 'to establish a proper cause of action on the issue of any illegality on the part of Tendele'. But quite apart from the pleadings issue, as rightly submitted by the CER, it is necessary for this Court to pronounce on the interpretive question for two reasons. First, the high court's order stands until it is set aside by this Court and is binding in KZN. This, as appears from *Mineral Sands Resources*,[6] gives rise to a divergence of interpretation of the relevant statutory provisions in the KZN Division and other Divisions in the country. Second, the absence of clarity and certainty concerning the correct interpretation

[6] *Mineral Sands* fn 5.

S.S.D

will potentially weaken the environmental protections sought to be achieved by s 24 of the Constitution and NEMA. This, in turn, would result in the flouting of environmental standards and undermine the rule of law.[7]

The MPRDA does not cover environmental impacts of mining

[28] As stated above, the high court accepted that prior to the commencement of the One Environment System on 8 December 2014, anyone intending to mine would of necessity undertake listed activities and require environmental authorisation in terms of s 24 of NEMA. Despite this, the court held that the decision to grant a mining right and approve a mining EMP, 'effectively constituted the environmental authorisation to conduct the mining activity'.

[29] Counsel for the appellants argued that the high court was wrong to hold that the environmental impacts of mining were regulated exclusively through the MPRDA and the requirement to obtain an EMP under that Act before commencing mining. The high court's interpretation, it was argued, collapses NEMA into the MPRDA, instead of allowing each statute to regulate environmental matters in tandem.

[30] Counsel for Tendele, however, submitted that the MPRDA was enacted to cover the field in relation to the environmental impacts and management of mining-related activities. The legislature, so it was submitted, made the implementation of the MPRDA subject to the principles in s 2 of NEMA, but left the interpretation thereof and decision-making in the hands of the functionaries of the DMR in accordance with the MPRDA and the regulations made under it.

[7] The rule of law, enshrined in s 1 of the Constitution, requires that legislation be enacted and publicised in a clear and accessible manner to enable people to regularise their conduct and affairs accordingly. A decision on the proper construction of NEMA is necessary for mines to regulate their conduct and affairs lawfully.

[31] Both the MPRDA and NEMA are statutes that give effect to the right to have the environment protected for the benefit of present and future generations, enshrined in s 24 of the Constitution.[8] It is a settled principle that courts are required to interpret statutes purposively, in conformity with the Constitution and in a manner that gives effect to the rights in the Bill of Rights.[9] In *Fuel Retailers*,[10] the Constitutional Court said:

'The role of the courts is especially important in the context of the protection of the environment and giving effect to the principle of sustainable development. The importance of the protection of the environment cannot be gainsaid. Its protection is vital to the enjoyment of the other rights contained in the Bill of Rights; indeed, it is vital to life itself.'

[32] The Constitutional Court has explained NEMA's structural and integrative role regarding the protection of the environment, as follows:

'NEMA was enacted as a general statute that coordinates environmental functions performed by organs of state. It also provides for "co-operative environmental governance by establishing principles for decision-making on matters affecting the environment". As is evident from the long title, NEMA was passed to establish a framework regulating the decisions taken by organs of state in respect of activities which may affect the environment. It lays down general principles which must be followed in making decisions of that nature.'[11]

---

[8] *Maccsand (Pty) Ltd v City of Cape Town and Others* [2012] ZACC 7; 2012 (4) SA 181 (CC) para 8. Section 4 of the Mineral and Petroleum Resources Development Act 28 of 2002 (MPRDA) states that when construing its provisions, any reasonable interpretation consistent with its objects (which includes giving effect to s 24 the Constitution) must be preferred. Section 24 of the Constitution provides:

'**Environment**

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.'

[9] *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others In re: Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others* 2001 (1) SA 545 (CC) para 23; *Independent Institute of Education (Pty) Ltd v KwaZulu-Natal Law Society and Others* [2019] ZACC 47; 2020 (2) SA 325 (CC) paras 1-2.

[10] *Fuel Retailers Association of Southern Africa v Director-General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province and Others* 2007 (6) SA 4 (CC) para 102.

[11] *Maccsand* fn 8 para 9, footnotes omitted.

S.S.D.

[33] These mandatory principles, set out in s 2(1) of NEMA, must be applied when an organ of state takes any decision in terms of NEMA *or any statutory provision* concerning the protection of the environment, and guide the interpretation, administration and implementation of NEMA and any other law concerned with environmental protection or management.[12]

[34] Consistent with these principles, sustainable development and sustainable use and exploitation of natural resources are at the core of the protection of the environment. Thus, s 2(4)*(a)* of NEMA imposes sustainable development which requires that a 'risk-averse and cautious approach is applied' whereby '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'.[13] NEMA requires that the environment be protected by securing 'ecologically sustainable development and use of natural resources while promoting justifiable economic and social development'.[14]

[35] The integrative approach to the protection and management of the environment is emphasised in the language of NEMA itself. Section 2(4)*(b)* states:

'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.'

---

[12] Section 2(1) of NEMA provides:
'The principles set out in this section apply throughout the Republic to the actions of all organs of state that may significantly affect the environment and–
(a) . . .
(b) serve as the general framework within which environmental management and implementation plans must be formulated;
(c) serve as guidelines by reference to which any organ of state must exercise any function when taking any decision in terms of this Act or any statutory provision concerning the protection of the environment;
(d) . . .
(e) guide the interpretation, administration and implementation of this act, and any other law concerned with the protection or management of the environment.'

[13] Sections 2(4)*(a)*(vii) and 2(4)*(a)*(viii).

[14] Preamble to NEMA.

S.S.D.

[36] As already stated, s 24(2)*(a)* of NEMA empowers the Environment Minister to identify 'activities which may not commence without environmental authorisation from the competent authority'. It must be stressed that s 24(2)*(a)* is not confined to activities that relate specifically to mining: once an activity has been listed in terms of that provision, environmental authorisation to conduct that activity must be obtained. Listed activities, as stated, include establishing infrastructure for the bulk transportation of water and facilities for the storage of fuel, and clearing indigenous vegetation.[15] So, nothing turns on the fact that listed activities specifically related to mining, identified by the Environment Minister in terms of s 24 of NEMA and published in the EIA Regulations of 21 April 2006, never came into force.[16]

[37] NEMA defines 'environmental authorisation', inter alia, as 'the authorisation by a competent authority of a listed activity or specified activity in terms of this Act'. It defines a 'competent authority' in respect of a listed activity as, 'the organ of state charged by this Act with evaluating the environmental impact of that activity and, where appropriate, with granting or refusing an environmental authorisation in respect of that activity'.

[38] Section 24F(1)*(a)* underscores the need for an environmental authorisation as a prerequisite for a listed activity. When Tendele's first EMP was approved in 2007, s 24F of NEMA provided:

'24F Offences relating to commencement or continuation of listed activities

(1) Notwithstanding any other Act, no person may–

[15] *Mineral Sands Resources* fn 5 para 8.

[16] 'List of Activities and Competent Authorities identified in terms of sections 24 and 24D of the National Environmental Management Act, 1998 GN R387, *GG* 28753, 21 April 2006', items 7 and 8 of the Schedule.

(a) commence an activity listed or specified in terms of s 24(2)*(a)* or *(b)* unless the competent authority or the Minister responsible for mineral resources, as the case may be, has granted an environmental authorisation for the activity. . . .'

[39] It is clear, simply from the above provisions of NEMA, that an environmental authorisation granted by a competent authority under NEMA is not the same thing as an EMP approved under the MPRDA. In *Minister of Mineral Resources v Stern* (to which we were not referred),[17] this Court assumed, without deciding, that an environmental authorisation under NEMA is essentially the same as an EMP. In my view, it is not. An environmental authorisation is required for the commencement of an activity identified in a listing notice. The impacts of listed activities on the environment are assessed in order 'to give effect to the general objectives of integrated environmental management' in Chapter 5 of NEMA,[18] which lays down rigorous processes for that assessment.

[40] Further, NEMA defines an 'environmental management programme' (a NEMA EMP) as meaning 'a programme required in terms of section 24'.[19] Section 24N provides that the competent authority 'may require the submission of an environmental management programme before considering an application for an environmental authorisation'. The main function of a NEMA EMP is to set out the proposed management, mitigation, protection and remedial measures that will be undertaken to address the environmental impacts of listed activities. It is not the function of a NEMA EMP to determine the activities which an applicant is authorised to undertake.[20]

---

[17] *Minister of Mineral Resources v Stern and Others* fn 1 paras 44-45.
[18] Section 24(1) of NEMA.
[19] Section 1 of NEMA. This definition was inserted by s 1*(g)* of the National Environmental Management Amendment Act 62 of 2008.
[20] *Mineral Sands Resources* fn 5 para 170.

[41] By contrast, an EMP under the MPRDA is unrelated to a listed activity envisaged in s 24(2)*(a)* of NEMA. The MPRDA defined an EMP as 'an approved environmental management programme contemplated in section 39'. Section 39(1) of the MPRDA, which has been repealed with the coming into force of the One Environmental System, required an applicant for a mining right to conduct an EIA and submit an EMP. The requisites for an EIA and EMP were prescribed in regulations 48-51 of the Mining Regulations.[21] Section 23(5) of the MPRDA provided that a mining right came into effect on the date on which the EMP was approved in terms of s 39(5).

[42] Section 38(1) of the MPRDA required the holder of a mining right to consider, investigate assess and communicate the impact of its mining on the environment as contemplated in s 24(7) of NEMA; and to manage all environmental impacts in accordance with its EMP. The main functions of an EMP under the MPRDA, is to establish baseline information concerning the affected environment; to investigate, assess and evaluate the impact of mining operations on the environment; to develop an environmental awareness plan describing the manner in which the applicant intended to inform its employees of any environmental risks; and to describe the manner in which it intended to modify, remedy, control or stop pollution or environmental degradation.[22]

---

[21] The Mineral and Petroleum Resources Development Regulations published under 'GN R527, *GG* 26275, 23 April 2004'.

[22] Section 39(3) of the MPRDA provided:

'An applicant who prepares an environmental management programme or an environmental management plan must-

(a) establish baseline information concerning the affected environment to determine protection, remedial measures and environmental management objectives;

(b) investigate, assess and evaluate the impact of his or her proposed prospecting or mining operations on-

(i) the environment;

(ii) the socio-economic conditions of any person who might be directly affected by the prospecting or mining operation; and

(iii) any national estate referred to in section 3 (2) of the National Heritage Resources Act, 1999 (Act 25 of 1999), with the exception of the national estate contemplated in section 3 (2) (i) (vi) and (vii) of that Act;

(c) develop an environmental awareness plan describing the manner in which the applicant intends to inform his or her employees of any environmental risks which may result from their work in the manner in which the risks must be dealt with in order to avoid pollution or the degradation of the environment; and

[43] The distinction drawn between an environmental authorisation in terms of NEMA and an EMP under the MPRDA in the cases, is thus not surprising. As already stated, it was rightly asserted in *Mineral Sands Resources*,[23] that mining typically involves listed activities and therefore the holder of a mining right requires environmental authorisation in terms of s 24 of NEMA. Likewise, the court in *Mining and Environmental Justice Community Network SA*,[24] followed the integrative approach to the protection of the environment, enjoined by NEMA. In an application to review and set aside a decision permitting coal mining in a protected wetlands area, it held that in order for a party to conduct mining activities, it must obtain a mining right and approval of an EMP in terms of the MPRDA, as well as environmental authorisation for listed activities in terms of s 24 of NEMA.[25]

[44] Solely for these reasons, the high court's finding that 'the environmental impacts of mining were regulated exclusively under the MPRDA (2002) in terms of approved EMPs', is erroneous. First, it is at odds with the plain wording of the provisions of both the MPRDA and NEMA, in particular the requirements of NEMA concerning an environmental authorisation, referred to in paragraphs 28-31 above, as well as the general objectives of integrated environmental management laid down in Chapter 5 thereof. Second, *Maccsand* makes it clear that the MPRDA cannot be read to override the applicability or requirements of other laws.[26] Indeed, and as stated in *Maccsand*, s 23(6) of the MPRDA expressly renders a mining right granted under that Act subject to 'any relevant law'.[27]

(d) describe the manner in which he or she intends to-

(i) modify, remedy, control or stop any action, activity or process which causes pollution or environmental degradation;

(ii) contain or remedy the cause of pollution or degradation and migration of pollutants; and comply with any prescribed waste standard or management standards or practices.'

[23] *Mineral Sands Resources* fn 5 paras 7, 8 and 17.

[24] *Mining and Environmental Justice Community Network of South Africa and Others v Minister of Environmental Affairs and Others* [2019] 1 All SA 491 (GP).

[25] *Mining and Environmental Justice Community Network of SA* fn 22 para 4.

[26] *Maccsand* fn 8 para 45.

[27] *Maccsand* fn 8 para 44. Section 23(6) provides:

[45] There is no provision in the MPRDA or NEMA which suggests that decision-making in relation to the environmental impacts of mining is left to functionaries of the DMR. The converse is true: s 38 of the MPRDA, prior to its repeal with effect from 8 December 2014, enjoined the holder of a mining right at all times to give effect to the general objectives of integrated environmental management laid down in Chapter 5 of NEMA; and to consider, investigate assess and communicate the impact of its mining on the environment as contemplated in s 24(7) of NEMA. The very purpose of Chapter 5 – containing the prohibition against the commencement of listed activities without environmental authorisation – is the *integrated* environmental management of activities. Section 24(1) of NEMA states, in terms, that the purpose of the identification of listed activities is to give effect to the general objectives of integrated environmental management laid down in Chapter 5.

[46] The mandatory objectives of integrated environmental management in Chapter 5 of NEMA plainly apply to mining and related activities. These include the integration of the s 2 principles into all decisions that may significantly affect the environment; identifying and evaluating actual and potential impacts on the environment and options for mitigation of activities; and ensuring that the effects of activities on the environment are adequately considered before actions are taken.[28]

'A mining right is subject to this Act, any relevant law, the terms and conditions stated in the right and the prescribed terms and conditions and is valid for the period specified in the right, which period may not exceed 30 years.'

[28] Section 23 of NEMA provides:

'(1) The purpose of this chapter is to promote the application of appropriate environmental management tools in order to ensure the integrated environmental management of activities,

(2) The general objective of integrated environmental management is to–

(a) promote the integration of the principles of environmental management set out in section 2 into the making of all decisions which may have a significant effect on the environment;

(b) identify, predict and evaluate the actual and potential impact on the environment, socio-economic conditions and cultural heritage, the risks and consequences and alternatives and options for mitigation of activities, with a view to minimising negative impacts, maximising benefits, and promoting compliance with the principles of environmental management set out in section 2;

S.C.J.

[47] What is more, s 24(7) of NEMA, to which the holder of a mining right is expressly subject, provides that the procedures for the investigation, assessment and communication of the potential impact of activities must, at a minimum, provide for 'co-ordination and co-operation between organs of state in the consideration of assessments where an activity falls under the jurisdiction of more than one organ of state'.[29] This is a powerful indicator that the MPRDA does not cover the environmental impacts of mining; neither does it leave decision-making on those impacts solely to functionaries of the DMR.

[48] That the MPRDA does not cover the field, is made even clearer in ss 24(8)*(a)*, 24K and 24L of NEMA. These provisions were inserted by s 2 of the 2008 NEMA Amendment Act[30] (ie after the enactment of the MPRDA) and came into effect on 1 May 2009. Section 24(8)*(a)* of NEMA provides that authorisations obtained under any other law (such as the MPRDA) for an activity listed in terms of NEMA, do not absolve an applicant from obtaining authorisation under NEMA:

'Authorisations obtained under any other law for an activity listed or specified in terms of this Act does not absolve the applicant from obtaining authorisation under this Act unless an authorisation has been granted in the manner contemplated in section 24L.'

[49] Section 24L(1) of NEMA provides for the alignment of environmental authorisations. More specifically, it states that where a listed activity contemplated in s 24 of NEMA is also regulated in terms of another law, the

---

(c) ensure that the effects of activities on the environment receive adequate consideration before actions are taken in connection with them;
(d) ensure adequate and appropriate opportunity for public participation in decisions that may affect the environment;
(e) ensure the consideration of environmental attributes in management and decision-making which may have a significant effect on the environment; and
(f) identify and employ the modes of environmental management best suited to ensuring that particular activities pursued in accordance with the principles of environmental management set out in section 2.'

[29] Section 24(7)*(g)* of NEMA.

[30] National Environmental Management Amendment Act 62 of 2008.

authority empowered under that other law to authorise that activity and the competent authority authorised to issue an environmental authorisation under NEMA, may exercise their respective powers jointly by issuing separate authorisations or an integrated environmental authorisation.[31] This, however, does not remove the requirement of an environmental authorisation under NEMA to conduct a listed activity.[32] In terms of s 24L(4), a competent authority empowered to issue an environmental authorisation under NEMA may regard an authorisation in terms of any other legislation that meets the requirements of NEMA, as an environmental authorisation under NEMA.

[50] Section 24K(1) of NEMA authorises the Environment Minister or an MEC responsible for environmental affairs to 'consult with any organ of state responsible for administering legislation relating to any aspect of an activity that also requires environmental authorisation under [NEMA] in order to coordinate the respective requirements of such legislation and to avoid duplication'.

[51] What all of this shows, is that the provisions of NEMA apply alongside those of the MPRDA relating to mining rights and EMPs, and there is no basis to restrict the application of Chapter 5 of NEMA, as Tendele seeks to do. The two laws serve different purposes within the competence of the authorities responsible for their administration. *Maccsand* illustrates the point.[33] A company, Maccsand, had been granted a mining right to mine under the MPRDA. In terms of that right it was authorised to enter and bring on to the relevant land, equipment and

---

[31] Section 24L of NEMA provides:

'**Alignment of environmental authorisations-**

(1) If the carrying out of a listed activity or specified activity contemplated in section 24 it is also regulated in terms of another law or a specific environmental management Act, the authority empowered under that other law or specific environmental management Act to authorise that activity in the competent authority empowered under Chapter 5 to issue an environmental authorisation in respect of that activity may exercise their respective powers jointly by issuing–

(a) separate authorisations; or

(b) an integrated environmental authorisation.

[32] *City of Cape Town v Maccsand (Pty) Ltd and Others* 2010 (6) SA 63 (WCC) paras 10 and 11.

[33] *Maccsand* fn 8.

S.C.D.

materials to construct surface, underground or undersea infrastructure required for the purposes of mining. Maccsand contended that because it had various rights under the MPRDA, it did not need to obtain planning consent by the City of Cape Town under the Land Use Planning Ordinance 15 of 1985. Rejecting this contention, the Constitutional Court said:

'If it is accepted, as it should be, that LUPO regulates municipal land planning and that, as a matter of fact, it applies to land which is the subject matter of these proceedings, then it cannot be assumed that the mere granting of a mining right cancels out LUPO's application. There is nothing in the MPRDA suggesting that LUPO will cease to apply to land upon the granting of a mining right or permit. By contrast, section 23(6) of the MPRDA proclaims that a mining right granted in terms of that Act is subject to it and other relevant laws.'[34]

[52] Moreover, the high court's interpretation is inconsistent with the constitutional injunction to interpret statutes in a way that gives the right to protection of the environment its fullest possible effect. The principles in s 2 of NEMA must guide the interpretation, administration and implementation of NEMA and any other law concerned with environmental protection or management, such as the MPRDA: not the other way around. Otherwise construed, NEMA is deprived of direct force in relation to mining activities, and effectively sidestepped. Its mandatory principles would then only be applied insofar as they are reflected in the MPRDA and the separate environmental authorisation required for listed activities in s 24(2) of NEMA, would be rendered nugatory.

[53] This interpretation, contrary to Tendele's assertion and the high court's finding, does not result in a 'duplication' of regulatory functions, nor 'competing

[34] *Maccsand* fn 8 para 44, affirmed recently in *Maledu and Others v Itereleng Bakgatla Mineral Resources (Pty) Ltd and Another* [2018] ZACC 41; 2019 (2) SA 1 (CC) para 106: 'This conclusion also finds support in this Court's decision in *Maccsand. In Maccsand,* this Court held that the exercise of a mining right was subject to any other laws bearing on such a right. The MPRDA was not read to override the applicability or requirements of other statutes, such as the Land Use Planning Ordinance, that may impact upon mining activity'.

and contradictory but mandatory directions' by regulatory authorities. As shown above, s 24K(1) of NEMA refutes any duplication argument. In any event a similar argument was rejected in *Maccsand*:[35]

'Another criticism levelled at the finding of the Supreme Court of Appeal by Maccsand and the Minister for Mineral Resources was that, by endorsing a duplication of functions, the Court enabled the local sphere to veto decisions of the national sphere on a matter that falls within the exclusive competence of the national sphere. At face value this argument is attractive but it lacks substance. The Constitution allocates powers to three spheres of government in accordance with the functional vision of what is appropriate to each sphere. But because these powers are not contained in hermetically sealed compartments, sometimes the exercise of powers by two spheres may result in an overlap. When this happens, neither sphere is intruding into the functional area of another. Each sphere would be exercising power within its own competence. It is in this context that the Constitution obliges the spheres of government to cooperate with one another in mutual trust in good faith, and to coordinate actions taken with one another. The fact that in this case mining cannot take place until the land in question is appropriately rezoned is therefore permissible in our constitutional order. It is proper for one sphere of government to take a decision whose implementation may not take place until consent is granted by another sphere, within whose area of jurisdiction the decision is to be executed. If consent is, however, refused it does not mean that the first decision is vetoed. The authority from whom consent was sought would have exercised its power, which does not extend to the power of the other functionary. This is so in spite of the fact that the effect of the refusal in those circumstances would be that the first decision cannot be put into operation. This difficulty may be resolved through cooperation between the two organs of state, failing which, the refusal may be challenged on review.'

[54] In *Fuel Retailers*,[36] the issue was whether environmental authorities had considered the social, economic and environmental impacts of constructing a filling station. In resisting an application to review and set aside its decision authorising the construction of the filling station, the relevant government department contended that issues of need and desirability had been considered by

[35] *Maccsand* fn 8 paras 47-48; *Telkom SA SOC Limited v City of Cape Town and Another* [2020] ZACC 15; 2020 (10) BCLR 1283 (CC) para 35.
[36] *Fuel Retailers* fn 10 para 86.

S.S.D.

the local authority when it decided the application to rezone the property for the purpose of constructing the filling station. Therefore, so it was contended, the local authority did not have to reassess those issues. The Constitutional Court rejected this contention and held that each functionary operates within the purpose and ambit of its own enabling statutory provisions when taking administrative action. Thus, the satisfaction of the requirements of a specific section or Act does not equate to satisfaction of a similar requirement in a different section or Act. The court said:

'The environmental authorities assumed that the duty to consider need and desirability in the context of the Ordinance imposes the same obligation as the duty to consider the social, economic and environmental impact of a proposed development as required by the provisions of NEMA. They were wrong in that assumption.'

[55] It follows that the decision to grant a mining right and approve an EMP in terms of the MPRDA, may not be implemented without an environmental authorisation, if the holder of that right and EMP undertakes a listed activity as envisaged in NEMA. The presumption against the retrospective operation of statutes simply does not arise: the requirement of an environmental authorisation under NEMA does not take away or impair Tendele's mining right or EMP under the MPRDA.[37]

[56] This is confirmed by the language of the transitional provisions themselves. The relevant provisions of s 12 of the 2008 NEMA Amendment Act, as amended by Act 25 of 2014 provide:

'(2) An application for authorisation of an activity that is submitted in terms of Chapter 5 of [NEMA] and that is pending when this Act takes effect must, despite the amendment of [NEMA] by this Act, be dispensed with in terms of Chapter 5 of [NEMA] as if Chapter 5 had not been amended.

---

[37] *Unitrans Passenger (Pty) Ltd t/a Greyhound Coach Lines v Chairman, National Transport Commission and Others; Transnet (Autonet Division) v Chairman National Transport Commission and Others* 1999 (4) SA 1 (SCA) para 12.

S.S.D

...

(4) An environmental management plan or programme approved in terms of the [MPRDA] immediately before the date on which this Act came into operation must be regarded as having been approved in terms of [NEMA] as amended by this Act.'

[57] Three points should be made. First, the transitional provisions do not dispense with an environmental authorisation as a prerequisite for undertaking a listed activity: the opposite is true. Second, an EMP approved under the MPRDA does not have the status of an environmental authorisation under NEMA. That much is clear from the definitions in NEMA.[38] And third, s 12(4) means no more than that an EMP approved under the MPRDA must be accepted as an EMP issued in terms of NEMA. An EMP is but one of the prescribed environmental management instruments referred to in s 24(5) of NEMA. Put differently, the introduction of the One Environmental System with effect from 8 December 2014, did not retroactively deprive Tendele of its EMPs approved under the MPRDA.

The Minister's failure to act: a relevant consideration?

[58] In support of its finding that Tendele's EMPs were valid under the transitional provisions, the high court referred to the Environment Minister's power under s 12(5) of the 2008 NEMA Amendment Act to direct the holder of an old order mining right to upgrade an EMP to address any deficiencies that may lead to unacceptable environmental consequences. The court said:

'To date the Minister has not acted against Tendele in terms of s 12(5) of the NEMA Amendment Act, 2008. This suggests to me that the Minister is thus far satisfied about Tendele's approved EMPs and the manner in which it conducts its mining operations at Somkhele . . .

[38] An 'environmental authorisation' includes the authorisation by a competent authority of a listed activity or specified activity in terms of NEMA. An 'environmental management programme' means a programme required in terms of s 24 of NEMA.

S.S.D.

It seems to me that the Minister is well aware of Tendele's operations at Somkhele and that they are conducted in terms of approved EMPs. He also seems to be satisfied that such EMPs adequately address the environmental impacts of such operations at Somkhele. If the Minister was not so satisfied he would not have granted Tendele further mining rights as he did in 2016 to expand its mining operations in Reserve 3.'

[59] The high court erred. It is impermissible to interpret a statute according to the conduct or practice of a government functionary. The Constitutional Court put it thus:[39]

'Missing from this formulation is any explicit mention of a further fundamental contextual change, that from legislative supremacy to constitutional democracy. Why should a unilateral practice of one part of the executive arm of government play a role in the determination of the reasonable meaning to be given to a statutory provision? It might conceivably be justified where the practice is evidence of an impartial application of a custom recognised by all concerned, but not where the practice is unilaterally established by one of the litigating parties. In those circumstances it is difficult to see what advantage evidence of the unilateral practice will have for the objective and independent interpretation by the courts of the meaning of legislation, in accordance with constitutionally compliant precepts. It is best avoided.'

[60] For the above reasons, and having regard to the language, context and purposes of the relevant statutory provisions,[40] I have come to the conclusion that environmental authorisation to conduct a listed activity, in terms of s 24(2) of NEMA, is a requirement for mining. Consequently, Tendele's mining operations are unlawful. The appropriate relief is set out below.

Land use approvals

[39] *Marshall and Others v Commission for the South African Revenue Service* [2018] ZACC 11; 2018 (7) BCLR 830 (CC) para 10.

[40] *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; 2012 (4) SA 593 (SCA) para 18, approved in *Airports Company South Africa v Big Five Duty-Free (Pty) Ltd* [2018] ZACC 33; 2019 (5) SA1 (CC) para 9.

S.S.D

[61] The appellants' case that Tendele's mining activities are unlawful because it has not obtained municipal approval for its mining operations, may be outlined as follows. Tendele does not have municipal approval to develop the land on which it conducts mining operations, as contemplated in s 38 of the KwaZulu-Natal Planning and Development Act 6 of 2008 (the KZN Planning Act). Section 48(3) of that Act prohibits any development without municipal approval. Tendele also does not have permission to use the land (Reserve No 3) for 'mining purposes' as envisaged in the Spatial Planning and Land Use Management Act 16 of 2013 (SPLUMA). It also requires approval of a 'mining operation' as defined in Schedule 2 to the Mtubatuba SPLUMA By-Law of January 2017 (The Mtubatuba By-Law).

[62] In this Court the appellants accepted that the KZN Planning Act which came into force on 1 May 2010, and SPLUMA, which commenced on 1 July 2015, do not apply retrospectively. Accordingly, mining operations by Tendele prior to the commencement of these statutes are lawful. This however, so it was contended, does not apply to new mining which may be conducted after the commencement of the KZN Planning Act and SPLUMA, in terms of the mining right granted to Tendele in 2016.

[63] Section 38(1) KZN Planning Act provides:

'The development of land situated outside the area of the scheme may only occur to the extent that it has been approved by the municipality in whose area the land is situated.'

Section 38(3) defines 'development' as follows:

'[T]he carrying out of building, construction, engineering, mining or other operations on, under or over any land, and a material change to the existing use of any building or land without subdivision.'

[64] It is evident from this definition that the KZN Planning Act was not intended to regulate existing mining. Tendele's mining operations do not fall

S.S.D.

within the definition of development in s 38(3), since it was already conducting mining operations on Reserve No 3 when the KZN Planning Act came into force. That mining does not constitute a material change to the existing use of land.

[65] Aside from this, it was not the appellants' case that the exercise of the mining right granted to Tendele in 2016 in respect of Areas 4 and 5, would constitute a material change to the existing use of land. Had such a case been pleaded, Tendele would have been able to put up evidence to show that the mining which is to take place in terms of the Areas 4 and 5 right, does not constitute a new use of land, but merely an extension of the existing use of the same land, ie mining on another portion of Reserve No 3; or that future mining is related to the mining that has been conducted at the mine to date.

[66] The same applies to the attack based on SPLUMA. It is unsustainable, both on the pleadings and a proper construction of the relevant statutory provisions. In terms of s 26(2), land may be used only for the purposes permitted by a land use scheme, by a town planning scheme (until such a scheme is replaced by a land use scheme), 'or in terms of subsection (3)'. Section 26(3) provides for the continuation, after the commencement of SPLUMA, of certain land uses in specific circumstances:

'Where no town planning or land use scheme applies to a piece of land, before a land use scheme is approved in terms of this Act, such land may be used only for the purposes listed in Schedule 2 to this Act and for which such land was lawfully used or could lawfully have been used immediately before the commencement of this Act.'

One of the land use purposes listed in Schedule 2 is 'mining purposes', defined in the Schedule as, 'purposes normally or otherwise reasonably associated with the use of land for mining'.

[67] Self-evidently, the purpose of s 26(3) is to maintain the existing land use regime applicable to land, in respect of which no town planning scheme or land

S.S.D.

use scheme applied when SPLUMA came into force, until a land use scheme is approved in terms of SPLUMA. It achieves this by permitting the use of land for certain purposes to continue where such land was lawfully being used for that purpose immediately before commencement of SPLUMA. It follows that the provisions of the Mtubatuba By-Law cannot trump the provisions of SPLUMA. Tendele's mining operations are not in breach of SPLUMA or the Mtubatuba By-Law.

Waste Management

[68] The founding affidavit states that there are massive stockpiles of waste rock at the mine and that Tendele's mining activities result in liquid coal waste and coal sludge or slurry. The process of crushing and washing coal produces liquid waste along with huge stockpiles of solid waste. Attached to the affidavit are photographs depicting huge mining dumps and rock dumps. The appellants alleged that the waste produced by Tendele falls within the definition of 'hazardous waste' in Schedule 3 to the Waste Act, which includes 'residue stockpiles' and 'wastes from the pyrolytic treatment of coal'.[41] The concept 'residue stockpile' includes waste derived from a mining operation and which is stockpiled, and wastes resulting from mining.[42] Tendele does not have a waste management licence as required by the Waste Act and is therefore mining illegally.

[69] Section 20 of the Waste Act provides that no person may commence, undertake or conduct a waste management activity, except in accordance with a

---

[41] In Schedule 3 to the Waste Act, '**"hazardous waste"** means any waste that contains organic or inorganic elements or compounds that may, owing to the inherent physical, chemical or toxicological characteristics of that waste, have a detrimental impact on health and the environment and includes hazardous substances, materials or objects within business waste, residue deposits and residue stockpiles as outlined. . . '.

[42] In Schedule 3 to the Waste Act, '**"residue stockpile"** means any debris, discard, tailings, slimes, screening, slurry, waste rock, foundry sand, mineral processing plant waste, ash or any other product derived from or incidental to a mining operation and which is stockpiled, stored or accumulated within the mining area for potential re-use, or which is disposed of, by the holder of a mining right, mining permit or, production right or an old order right, including historic mines and dumps created before the implementation of this Act'.

S.S.D

waste management licence or the requirements or standards determined in terms of s 19(3). A 'waste management activity' is defined as an activity listed in Schedule 1 or published by notice in the Gazette under s 19.

[70] In terms of s 19 of the Waste Act, the Environment Minister on 29 November 2013, published a list of waste management activities that have or are likely to have a detrimental effect on the environment (the 2013 listing notice). Regulation 7(1) of the 2013 listing notice states:

'A person who lawfully conducts a waste management activity listed in this schedule on the date of the coming into effect of this notice may continue with the waste management activity until such time that the Minister by notice in the Gazette calls upon such person to apply for a waste management licence.'

[71] It was argued on behalf of the appellants that the high court's conclusion that Tendele's conduct was lawful because the Minister had not called upon it to apply for a waste management licence, was wrong because it incorrectly ascribed to the Minister the power to determine the legality of Tendele's conduct. This, so it was argued, undermines the judicial function: the courts should determine the legality of conduct. It was also argued that regulation 7(1) cannot, in effect, immunise Tendele against obtaining a waste management licence, especially where this occurs due to the inaction of the Minister.

[72] These arguments, however, do not assist the appellants, for two reasons. The first is that a notice of waste management activities in terms of s 19(1) of the Waste Act, 'may contain transitional and other special arrangements in respect of waste management activities that are carried out at the time of their listing'.[43] Regulation 7(1) is thus specifically authorised. The second is that the appellants have not challenged the constitutionality of regulation 7(1). This regulation is not

[43] Section 19(3)*(c)* of the Waste Act.

S.S.D

void or non-existent, but exists as a fact and remains lawful until it is set aside.[44] The appellants have not established that Tendele is mining unlawfully because it does not have a waste management licence.

Relocation of traditional graves

[73] Section 35 of the KZN Heritage Act provides that before any grave may be damaged, altered, exhumed or removed, prior written consent must be obtained from AMAFA Heritage Council. The Council must be satisfied that an applicant has made concerted efforts to engage the relevant communities affected, and that those communities have agreed to the relocation of graves.[45]

[74] Ms Shiela Berry, a trustee of the first appellant, in her affidavit states that when Tendele started mining, there were many graves on the mining site which were exhumed and moved to another graveyard with no regard for the Zulu people's deep respect for their ancestors. This graveyard is situated on a slope, and some of the graves have been undercut by rain and are slumping. In some of the graves body parts can be seen.

[75] Mr Du Preez states that Tendele 'did not appreciate the process that the mine was required to follow in order to relocate traditional graves', and that its failure to obtain authorisation 'was due to a bona fide oversight'. This is improbable. On its own version, Tendele's consultant, Groundwater Consulting

---

[44] *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* 2004 (6) SA 222 (SCA) para 26; *Merafong Local Municipality v AngloGold Ashanti Limited* [2016] ZACC 35; 2017(2) SA 211 (CC) para 36.

[45] Section 35 of the KZN Heritage Act provides:

'**General Protection**: Traditional burial places –

35.(1) No grave–

(a) not otherwise protected by this Act; and

(b) not located in a formal cemetery managed or administered by a local authority,

may be damaged, altered, exhumed, removed from its original position, or otherwise disturbed without the prior written approval of the Council having been obtained on written application to the Council.

(2) The Council may only issue written approval once the Council is satisfied that–

(a) the applicant has made a concerted effort to consult with communities and individuals who by tradition may have an interest in the grave; and

(b) the applicant and the relevant communities or individuals have reached agreement regarding the grave.'

S.S.D.

Services (GCS), had advised it in 2007 already, that grave relocation needed to be dealt with separately from a heritage impact assessment. Tendele engaged AMAFA Heritage Council only in 2017 – some 10 years later. In its report to Tendele in December 2007, GCS described the importance of gravesites to the community as follows:

'Many of the local residents place great religious significance on gravesites. This strong reverence for graves emerges from the belief that the spirit (ithongo or moya, in Zulu) of individual persons continue to maintain an active interest in and affect the living (mostly relatives). Spirits of deceased relatives are referred to as ancestors (ukhokho, in Zulu) and much of their interactions with their living descendants take place with reference to their graves. Consequently, graves have developed into sites of particular social significance and not only stand as symbols of the relationship between the living and the dead, but also represent a locale where these relationships can be articulated and find expression. It is largely the practice of ancestor worship that has led graves to acquire a particularly strong cultural significance that they have. Residents in the area regard ancestor worship as an ancient religious practice.'

[76] It appears from the answering papers that prior to consulting AMAFA Heritage Council, Tendele had entered into detailed agreements with members of the community for the relocation of graves. In terms of this agreement, the relatives of deceased persons were paid an amount of R8 500 'in respect of all Family Graves', located in the mining area. The agreement states that '"all Family Graves" means the total of all graves [of relatives of the person concluding the agreement] located at the Premises'.

[77] The answering affidavit states that all relocations of traditional graves have taken place in consultation with the affected families and communities, and that Tendele has engaged in consultations with AMAFA Heritage Council to ensure that its conduct in relation to traditional graves complies with the law. At a meeting with the Council on 8 May 2017, Tendele gave an undertaking that in future, no graves would be exhumed or relocated without the necessary permits.

S S.D.

[78] On the strength of this undertaking and Tendele's engagements with AMAFA Heritage Council, the high court stated that the Council 'would have said something regarding Tendele's conduct if it was not satisfied with the manner in which traditional graves were being relocated'. It held that the appellants failed to make out a proper case for an interdict.

[79] Whether the relocation of graves is unlawful cannot be decided by reference to the view taken by the AMAFA Heritage Council. It is common ground that Tendele has removed or altered traditional graves in violation of the KZN Heritage Act. That plainly, was unlawful. It is conduct grossly inconsistent with the Constitution, and invalid.

[80] Given the particular circumstances of this case, it is my considered view that although the appellants asked for an interdict in the notice of motion, a declaratory order would constitute appropriate relief.[46] This order should not be suspended, since Tendele does not conduct unplanned mining. It must know in advance which graves need to be relocated and it has demonstrated that it is able to comply with the provisions of the KZN Heritage Act.

Relief

[81] The appellants sought an order interdicting Tendele from carrying on with any mining operations in Areas 1, 2 and 3 on Reserve No 3; the KwaQubuka and Luhlanga areas on Reserve No 3; and one part of the remainder of Reserve No 3, 'until further order' of the high court. Although the appellants did not ask for a declaratory order, such an order would be just and equitable in the circumstances, for the reasons stated below.

[46] *Economic Freedom Fighters and Others v Speaker of the National Assembly and Another* [2017] ZACC 47; 2018 (2) SA 571 (CC) para 211.

S.S.D.

[82] Section 172(1)*(a)* of the Constitution applies. It provides that conduct inconsistent with the Constitution must be declared invalid. The court has no discretion. In terms of s 172(1)*(b)* the court has a discretion to grant just and equitable relief, either independently or together with a declaratory order.[47] The power in s 172(1)*(b)* to make any order that is just and equitable is not limited to declarations of invalidity; and 'is so wide and flexible that it allows Courts to formulate an order that does not follow prayers in the notice of motion'.[48]

[83] In the exercise of this wide remedial power, the Constitutional Court has highlighted the need for courts to be pragmatic in crafting just and equitable remedies.[49] A pragmatic approach that grants effective relief – that upholds, enhances and vindicates the underlying values and rights entrenched in the Constitution[50] – and which will allow Tendele, the primary employer in Mtubatuba, to continue mining while it brings itself into compliance with NEMA, is called for in this case.

[84] If Tendele's mining operations are brought to a grinding halt, this would have catastrophic consequences. The mine is the primary driver of economic activity in Mtubatuba. It employs over 1000 people and 83% of its employees live in the Mpukunyoni area surrounding the mine. According to the Integrated Development Plan of the Mtubatuba Municipality, mining is one of the major employment sectors in the municipality; and the unemployment rate in the area

---

[47] Section 172(1) of the Constitution provides:
'**172 Powers of courts in constitutional matters**
(1) When deciding a constitutional matter within its power, a court-
(a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and
(b) may make any order that is just and equitable, including-
(i) an order limiting the retrospective effect of the declaration of invalidity; and
(ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect.'

[48] *Economic Freedom Fighters* fn 46 paras 210-211.

[49] *Electoral Commission v Mhlope and Others* [2016] ZACC 15; 2016 (5) SA 1 (CC) para 132.

[50] *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC) para 34.

S.S.D.

which previously was at 59.7%, had improved to 39% in 2011, as a result of the mining operations at Somkhele.

[85] The Mpukunyoni *amici* submitted that if mining operations were to stop, the South African anthracite market would be wiped out, which would have a knock-on effect on the ferrochrome industry that employs more than 20,000 people and is a major exporter in the South African economy. Tendele has also made significant investments in the development of the area, which include the provision of apprenticeships, training in farming activities, adult basic education and training, bursaries and student teachers. Between December 2006 and December 2016, Tendele spent R719 million on local community employee salaries; R54 million on community projects in accordance with approved social and labour plans annexed to the Tendele mining rights; and R300 million on procuring services from community-based black economic empowerment companies.

[86] The termination of mining operations, even temporarily, would be the death knell of the Mtubatuba economy and would result in the loss of the livelihood of the Mpukunyoni community, together with significant benefits described above. For these reasons, Tendele and the Mpukunyoni *amici* have asked this Court to grant Tendele an opportunity to regularise its position in relation to the requisite statutory approvals.

Costs

[87] The high court stated that there was 'no reason why costs should not follow the result' and ordered the appellants to pay Tendele's costs. Tendele has since abandoned the costs order. However, a notice of abandonment does not overturn the judgment of the court a quo, which remains on the public record and is available to persons researching or seeking a direction on costs in an

S.S.D

environmental law dispute. There is no public record that the costs order was abandoned.

[88] It is trite that a judgment stands unless it is rescinded, or set aside by an appellate court. The abandonment of a judgment is a unilateral act which operates *ex nunc* and not *ex tunc*. It precludes the party who has abandoned its rights under the judgment from enforcing it, but the judgment still exists with all its intended legal consequences.[51]

[89] An award of costs involves the exercise of a discretion. It is a settled principle that an appellate court does not lightly interfere with the exercise of a true discretion, unless it is shown that the discretion was not exercised judicially, more specifically, that the decision could not reasonably have been reached by a court properly directing itself to the relevant facts and principles.[52] The CER submitted that the high court did not exercise its discretion judicially when it ordered the appellants to pay Tendele's costs, and that the costs order should be overturned whatever the outcome of the appeal.

[90] The costs order not only has an obvious chilling effect on the enforcement of a constitutional right,[53] but the high court also disregarded the protection against an adverse costs order contained in NEMA itself. Section 32(2) states:

'A court may decide not to award costs against the person who, or group of persons which, fails to secure the relief sought in respect of any breach or threatened breach of any provision of this Act, including a principle contained in Chapter 1, or of any provision of a specific environmental management Act, or any other statutory provision concerned with the protection of the environment or the use of natural resources, if the court is of the opinion that the person or group of persons acted reasonably out of a concern for the public interest or in the interest

[51] *Engen Petroleum Ltd v Paargen Erf 116 (Pty) Ltd t/a Impala Motors and Others* [2018] ZANWHC 27 para 9.
[52] *Public Protector v South African Reserve Bank* [2019] ZACC 29; 2019 (9) BCLR 1113 (CC) para 107.
[53] *Biowatch Trust v Registrar Genetic Resources and Others* [2009] ZACC 14; 2009 (6) SA 232 (CC) para 21.

of protecting the environment and had made due efforts to use other means reasonably available for obtaining the relief sought.'

[91] It is clear from the founding papers that the appellants were seeking to enforce the right to have the environment protected, contained in s 24 of the Constitution, as well as the provisions of NEMA and various other environmental management statutes. The application for the interdict was brought in the public interest, the interests of the people residing in the vicinity of the mine affected by mining operations and in the interests of the appellants' members, as envisaged in s 38 of the Constitution.

[92] In the light of the facts and principles outlined above, the order directing the appellants to pay Tendele's costs is not one that could reasonably have been made. The high court failed to exercise its discretion judicially and the costs order must be set aside.

[93] In the result, I would make the following order:

1 The appeal succeeds with costs, including the costs of two counsel.

2 The order of the high court is set aside and replaced with the following:

'2.1 It is declared that the commencement or continuation of mining operations by the first respondent on the properties listed below (the properties) is unlawful and unconstitutional, unless and until it has been granted an environmental authorisation in terms of the National Environmental Management Act 107 of 1998 (NEMA), to undertake the relevant listed activities contained in the List of Activities and Competent Authorities Identified in terms of Sections 24(2) and 24D of NEMA, published under Government Notices R983, 984 and 985, in *Government Gazette* 38282 of 4 December 2014:

S. S. D.

(a) Area 1 on Reserve No 3 (Somkhele) No 15822, measuring 660.5321 hectares as described in the mining right dated 22 June 2007;

(b) Areas 2 and 3 on Reserve No 3 (Somkhele) No 15822, measuring 779.8719 hectares as described in the mining right dated 30 March 2011;

(c) The KwaQubuka and Luhlanga areas on Reserve No 3, measuring 706.0166 hectares as described in the mining right dated 8 March 2013;

(d) Areas 4 and 5 on part of the remainder of Reserve No 3 No 15822, in extent to 21233.0525 hectares as described in the mining right dated 26 October 2016.

2.2 It is declared that the first respondent's commencement or continuation of mining operations on the properties is unlawful and unconstitutional, unless and until it has obtained written approval in terms of s 35 of the KwaZulu-Natal Heritage Act 4 of 2008 to damage, alter, exhume or remove any traditional graves from their original positions.

2.3 The order in paragraph 2.1 above is suspended for a period of 12 months to enable the first respondent to obtain the requisite environmental authorisation. In the event that the first respondent does not obtain that authorisation within the said period, it shall be entitled to apply to this Court for an extension of the period, setting out the steps taken to obtain environmental authorisation; the status of that application; and why a further suspension of the order in paragraph 2.1 is necessary.

2.4 The first respondent is ordered to pay the costs of the application, including the costs of two counsel.'

A SCHIPPERS

S.S.D

JUDGE OF APPEAL

Ponnan JA (Plasket and Nicholls JJA and Ledwaba AJA concurring):

[94] Motion proceedings, said Harms DP in *National Director of Public Prosecutions v Zuma*, 'are all about the resolution of legal issues based on common cause facts'.[54] He added:

'Unless the circumstances are special they cannot be used to resolve factual issues because they are not designed to determine probabilities. It is well established under the *Plascon-Evans* rule that where in motion proceedings disputes of fact arise on the affidavits, a final order can be granted only if the facts averred in the applicant's (Mr Zuma's) affidavits, which have been admitted by the respondent (the NDPP), together with the facts alleged by the latter, justify such order. It may be different if the respondent's version consists of bald or uncreditworthy denials, raises fictitious disputes of fact, is palpably implausible, far-fetched or so clearly untenable that the court is justified in rejecting them merely on the papers.'

[95] In motion proceedings, the affidavits constitute both the pleadings and the evidence.[55] The issues and averments in support of a party's case should appear clearly therefrom.[56] They serve, not just to define the issues between the parties, but also to place the essential evidence before the court. An applicant must therefore raise in the founding affidavit the issues as well as the evidence upon which it relies to discharge the onus of proof resting on it.

[96] It is impermissible for an applicant in motion proceedings to make out a new case in reply. As Cloete JA pointed out in *Minister of Land Affairs and Agriculture v D & F Wevell Trust,* '[t]he reason is manifest — the other party may well be prejudiced because evidence may have been available to it to refute the

---

[54] *National Director of Public Prosecutions v Zuma* [2009] ZASCA 1; 2009 (2) SA 277 (SCA); 2009 (1) SACR 361 (SCA); 2009 (4) BCLR 393 (SCA); [2009] 2 All SA 243 (SCA) para 26.
[55] *Transnet Ltd v Rubenstein* 2006 (1) SA 591 (SCA) para 28.
[56] *Minister of Land Affairs and Agriculture and Others v D & F Wevell Trust and Others* [2007] ZASCA 153; 2008 (2) SA 184 (SCA) para 43.

S.S.D.

new case on the facts. The position is worse where the arguments are advanced for the first time on appeal'.

[97] In my view, this is precisely such a case. Seegobin J appeared to recognise as much in his judgment on the application for leave to appeal,[57] when he observed:

'I immediately point out that the applicants' case was very poorly pleaded on the papers. This much was fairly and properly conceded by Mr Ngcukaitobi in the present application. The applicants had simply failed to make out a proper case for an interdict in their founding papers. I considered that the factual allegations relied on were, for the most part, incorrect and unsubstantiated. The application was accordingly dismissed for the reasons set out in the judgment.'

[98] That, ought to have led to the dismissal of the application for leave to appeal. Surprisingly, it did not. The learned judge proceeded to hold:

'Despite the difficulties in the papers and my misgivings about the applicants' prospects, I have listened intently to the submissions advanced by all counsel in the present application. In view of the various pieces of legislation involved as well as issues of interpretation and questions of legality that may arise I am persuaded that an appeal would have reasonable prospects of success. I also consider that it may also be in the public interest to have some finality on the issues raised by the applicants. For these reasons I am persuaded that leave to appeal should be granted.'[58]

[99] If, indeed, the appellants 'had simply failed to make out a proper case' in their founding papers for the relief sought, it is difficult to comprehend why the learned judge took the view that the matter was nonetheless deserving of the attention of this Court. If, as he correctly points outs, the factual allegations relied

[57] *Global Environmental Trust and Others v Tendele Coal Mining (Pty) Ltd and Others* [2019] ZAKZPHC 62 para 7.
[58] *Global Environmental Trust* fn 57 para 8.

S.S.D

upon by the appellants were, 'for the most part, incorrect and unsubstantiated', that, one would have thought, would have been the end of the matter.

[100] Seegobin J felt impelled to grant leave to the appellants to appeal, because in his view there were 'issues of interpretation and questions of legality that may arise'. What those were, he did not elaborate. And, how one would get to those issues, given the evident unreliability of the appellants' allegations, remained unexplained. Despite this, my colleague Schippers JA inclines to the view that the appeal must succeed. Needless to say, I do not agree.

[101] The appellants seek an order interdicting the first respondent (Tendele), from conducting mining operations at its Somkhele mine. They contend that Tendele is mining without the necessary statutory authorisations and approvals. The interdict sought is far reaching. If granted, it would have the effect of closing Tendele's operations. More the reason, one would think, for a proper case to have been made out on the papers.

[102] The appellants say that Tendele's current mining operations are unlawful because it has no: (i) environment authorisation issued in terms of s 24 of the National Environmental Management Act 107 of 1998 (NEMA); (ii) land use authority, approval or permission from any municipality having jurisdiction; (iii) waste management licence issued by the fourth respondent, the Minister of Environmental Affairs (the Minister) in terms of s 43 of the National Environmental Management: Waste Act 59 of 2008 (the Waste Act); and (iv) written approval in terms of s 35 of the KwaZulu-Natal Heritage Act 4 of 2008 (the KZN Heritage Act) to damage, alter, exhume or remove any traditional graves.

S. S.D

[103] Tendele began its mining operations in 2006 pursuant to the grant of an 'old order' mining licence and subsequently a mining right, and the approval of an Environmental Management Programme (EMP), granted and approved in terms of the Mineral and Petroleum Resources Development Act 28 of 2002 (the MPRDA). The Somkhele Mine comprises a single mining area on Reserve No 3. However, the mining operations are divided amongst five areas and separate mining rights and EMP's apply to the different areas. The mining right in respect of Area 1 was granted to Tendele on 21 May 2007. The EMP applicable to the Area 1 mining right was approved on 22 June 2007. The Areas 2 and 3 converted mining right was granted to Tendele on 1 February 2011. On 8 March 2013, the right was amended to include the KwaQubuka and Luhlanga areas. The EMP attaching to the mining right of Areas 2 and 3 was approved on 30 March 2011. Amendments to this EMP, to cater for the inclusion of the KwaQubuka and Luhlanga areas were approved on 29 May 2012. The Areas 4 and 5 mining right was granted on 31 May 2016. The EMP applicable to this right was approved on 26 October 2016.

[104] Tendele is only actively mining in Area 1 and the extended area of Area 2, namely, the KwaQubuka and Luhlanga areas. The Mine's coal wash plants are located in Area 2. Mining operations are not being undertaken in Area 3. Mining operations ceased in Area 2 in January 2012, due to depletion of the anthracite reserves. Mining operations have not yet started in Areas 4 and 5. The second and third appellants have launched review proceedings to, inter alia, set aside the mining right granted in respect of Areas 4 and 5.

[105] The appellants seek to interdict all of Tendele's mining operations, until it has obtained the authorisations referred to in paragraph 96 above, which it says are required. In the view that I take of the matter, which is evidently much

S.S.D.

narrower than that of my colleague, Schippers JA, the high court correctly refused to grant the relief sought.

As to (i)

[106] The appellants contend that Tendele is mining unlawfully because no environmental authorisation as contemplated by NEMA has been issued to it. According to the appellants, such environmental authorisation was required both prior to 8 December 2014, when the One Environmental System was introduced and, after that date.

[107] The question of whether Tendele was required to obtain an environmental authorisation as required by s 24F(1)*(a)* of NEMA does not arise on the papers, because the appellants failed to allege that Tendele is conducting any of the listed activities at Somkhele. The appellants' founding affidavit lacks the necessary allegations to sustain this ground of unlawfulness. Section 24F(1)*(a)* of NEMA prohibits the commencement of 'listed activities' in the absence of environmental authorisation. Listed activities are those identified in terms of s 24(2).

[108] Acting in terms of this section (and its predecessor, s 21 of the Environment Conservation Act 73 of 1989 (the ECA)), the Minister identified the activities that may not commence without environmental authorisation. Since the first list of activities was published in terms of the ECA on 5 September 1997, the list of activities has been replaced and amended on several occasions. New activities have been added; the definition of certain activities has been amended and some activities have been removed.

S.S.D.

[109] Any allegation that Tendele has breached s 24F(1)*(a)* of NEMA, at a bare minimum, had to identify: (a) the listed activity alleged to have been commenced without environmental authorisation; and (b) the date on which that activity commenced. The appellants did not plead these essential facts in their founding affidavit. The sum total of the appellants' evidence in the founding affidavit on this score was the following:

'Normally speaking, mining is a listed activity which has an impact on the environment and as such an Environmental Authorisation ("EA") must be obtained in terms of the National Environmental Management Act 107 of 1998 (NEMA).'

[110] Tendele's answering affidavit set out why, as a matter of law, it contended that there is no requirement for environmental authorisation for its mining operations. It also pointed out that, under the ECA, authorisation under any environmental legislation was not required for mining operations or activities directly related thereto. Given the case that it was called upon to answer, Tendele's answering affidavit was a perfectly legitimate response. It bore no onus or evidentiary duty.

[111] In their replying affidavit, the appellants stated:

'It is accepted that there are no listed activities related to "mining" as a special category. However, there are a host of listed activities which relate to mining. These are set out in a table which is annexure 'R1' hereto.'

That was the high-water mark of the appellants' case. Annexure R1 contains a list of the activities requiring environmental authorisation under NEMA. The appellants made no effort, even in reply, to identify which of the activities Tendele was allegedly undertaking, nor when Tendele allegedly commenced them.

[112] Indeed, as pointed out in *Minister of Land Affairs and Agriculture v D & F Wevell Trust*:

S.S.D.

'It is not proper for a party in motion proceedings to base an argument on passages in documents which have been annexed to the papers when the conclusions sought to be drawn from such passages have not been canvassed in the affidavits . . . A party cannot be expected to trawl through lengthy annexures to the opponent's affidavit and to speculate on the possible relevance of facts therein contained. Trial by ambush cannot be permitted.'[59]

[113] In any event, by the time of the replying affidavit it was already too late. These are the kinds of allegations that should have been included in the founding affidavit so that Tendele could answer them. On appeal, the appellants try to escape this difficulty by casting a duty or onus on Tendele to have supplied the missing allegations, either in its answering affidavit or the correspondence. They say that it was clear from the pre-litigation correspondence that the appellants lacked sufficient detail to enumerate which activities triggered specific listed activities; that it was common cause from the correspondence that Tendele was conducting listed activities and, that Tendele ought to have denied that it was engaged in any listed activities or explained what listed activities it was undertaking. But, that is to cast a duty on Tendele that, in law, it simply did not bear.

[114] The appellants submit that Tendele ought to have supplied the allegations that were missing from the founding affidavit, because those facts were peculiarly within Tendele's knowledge. In support of this proposition, they rely on *Wightman t/a J W Construction v Headfour (Pty) Ltd and Another*.[60] But *Wightman* does not assist them. As it was put in *Wightman*, '[w]hen the facts averred are such that the disputing party must necessarily possess knowledge of them and be able to provide an answer',[61] a bare denial will not suffice to create a dispute of fact. However, as *Wightman* made plain: '[t]here will of course be

[59] *Minister of Land Affairs* fn 56 para 43.
[60] *Wightman t/a J W Construction v Headfour (Pty) Ltd and Another* [2008] ZASCA 6; [2008] 2 All SA 512 (SCA); 2008 (3) SA 371 (SCA).
[61] *Wightman* fn 60 para 13.

S.S.D

instances where a bare denial meets the requirement because there is no other way open to the disputing party and nothing more can therefore be expected of him'.[62] This is precisely such a situation. There was nothing to deny because the appellants did not aver sufficient facts that called for more. If anything, they were mistaken about the elements of their cause of action. In the circumstances, Tendele had no duty to supply the missing allegations.

[115] It follows that on the papers as they stand, one simply does not get to the issue of the proper interpretation of NEMA.

As to (ii)

[116] The appellants contend that Tendele is undertaking mining operations in contravention of the KwaZulu-Natal Planning and Development Act 6 of 2008 (the KZN Planning Act) and the Spatial Planning and Land Use Management Act 16 of 2013 (SPLUMA). The appellants accept that the KZN Planning Act and SPLUMA do not apply to any of Tendele's operations that occurred prior to the commencement of those statutes. They now limit their attack to mining, which they say, will occur in the future in respect of the mining right of Areas 4 and 5. In heads of argument filed on behalf of the appellants, it is contended that the use of the land covered by the Areas 4 and 5 mining right 'to commence mining would be to convert that land to a new purpose by "making use of its resources"'.

[117] The contention is unsustainable. In the first place, it was not pleaded by the appellants. As a result, the necessary factual allegations are nowhere to be found in the appellants' affidavits. Tendele was also never afforded an opportunity to respond to such a case. In the second place, the appellants' contention treats the mining that will occur in Areas 4 and 5 in the future as if unrelated to the mining

[62] Ibid.

S.S.D

that has occurred to date at Somkhele. As explained above, the Somkhele Mine (including the area forming the subject of the Areas 4 and 5 mining right) comprise a single mining area on Reserve No 3. Tendele's mining operations commenced on Reserve No 3 in 2006 before both the KZN Planning Act and SPLUMA commenced.[63]

[118] Be that as it may, two of the relevant local municipalities have confirmed that no planning approval or land use approval is required for the continuation of mining operations by Tendele.

As to (iii)

[119] The appellants contend that Tendele's operations are unlawful as it does not have a waste management licence for its activities as required by the Waste Act. The appellants failed to identify any aspect of Tendele's operations that would require a waste management licence. This ground of alleged unlawfulness is accordingly unsustainable on the pleadings.

[120] That aside, in terms s 20 of the Waste Act, no person may commence, undertake or conduct a waste management activity except in accordance with a waste management licence or the requirements or standards determined in terms of s 19(3). A 'waste management activity' is defined in s 1 as any activity listed in Schedule 1 or published by notice in the Gazette under s 19. Section 19 empowers the Minister by notice in the Gazette to publish a list of waste management activities. On 29 November 2013 the Minister published the list of waste management activities (the 2013 notice) that have or are likely to have a detrimental effect on the environment.[64] The 2013 notice contains transitional

[63] The KZN Planning Act commenced on 1 May 2010 and SPLUMA commenced on 1 July 2015.
[64] 'List of Waste Management Activities that have, or are likely to have, a detrimental effect on the environment GN R921, *GG* 37083, 29 November 2013.'

S.S.D.

provisions, the purpose of which is to regularise the affairs of persons who were in the process of conducting waste management activities at the time of the publication of the notice.

[121] Regulation 7(1) of the 2013 notice provides:

'A person who lawfully conducts a waste management activity listed in this Schedule on the date of the coming into effect of this Notice may continue with the waste management activity until such time that the Minister by notice in a *Gazette* calls upon such person to apply for a waste management licence.'

Tendele's mining operations and any waste management activity that it was conducting, were being lawfully conducted in terms of its mining rights and approved EMP's at the time of the coming into effect of the 2013 notice. Tendele was therefore entitled to continue conducting such activity, until called upon by the Minister to apply for a waste management licence. The Minister has not called upon Tendele to do so.

[122] Moreover, the interdict that the appellants seek is plainly too broad in relation to the right sought to be protected. The alleged unauthorised undertaking of waste management activities in terms of the Waste Act could not possibly entitle the appellants to an interdict shutting down Tendele's entire mining operation. At best, they would only be entitled to relief in respect of a specified listed activity, assuming that such activity had been identified in their pleadings, which, as already stated, the appellants had failed to do.

As to (iv)

[123] Tendele accepts that it has previously removed or altered traditional graves, without being in possession of the necessary authorisations from the Amafa aKwaZulu-Natali Heritage Council (Amafa). It points out in its answering affidavit that it has since taken steps to rectify its past failures. Tendele details a

series of engagements between it and Amafa, which has not been meaningfully disputed by the appellants in reply.

[124] Tendele stated in its answering affidavit:

'There is no reasonable apprehension that Tendele will in future alter, relocate, damage or exhume any traditional graves without the necessary authorization from Amafa. Tendele has unequivocally committed itself to working with Amafa and the community to ensure that future relocations comply with the letter and the spirit of the law.

I am advised and accordingly submit that the [appellants'] complaints about Tendele's conduct in relation to traditional graves does not entitle them to any interdictory relief, far less an interdict against the entire mining operation at Somkhele.'

[125] As it was put in *National Council of Societies for the Prevention of Cruelty to Animals v Openshaw*:

'An interdict is not a remedy for past invasion of rights but is concerned with present or future infringements. It is appropriate only when future injury is feared. Where a wrongful act giving rise to the injury has already occurred, it must be of a continuing nature or there must be a reasonable apprehension that it will be repeated.'[65]

[126] There are no facts in this matter that would justify any reasonable apprehension that Tendele will again relocate or exhume graves without the appropriate approval. Moreover, here as well, even if the appellants' complaint were to be accepted, the alleged unauthorised removal of the traditional graves, could not possibly entitle them to an interdict shutting down the entire mining operation.

[127] In the result, I would dismiss the appeal. Tendele, commendably does not seek costs.

---

[65] *National Council of Societies for the Prevention of Cruelty to Animals v Openshaw* [2008] ZASCA 78; [2008] 4 All SA 225 (SCA); 2008 (5) SA 339 (SCA) para 20.

S.S.D

V M Ponnan
Judge of Appeal

S.S.D

APPEARANCES

For Appellants:	T Ngcukaitobi SC
	(with M Mazibuko)
Instructed by	Youens Attorneys, Pietermaritzburg
	Phatshoane Henney Attorneys,
	Bloemfontein
For Respondents	P Lazarus SC
	N Ferreira
Instructed by	Malan Scholes Inc, Johannesburg
	Claude Reid Inc, Bloemfontein
For *Amicus Curiae*,	
Centre for Environmental Rights	M Du Plessis SC
	T Palmer
	S Lushaba
Instructed by	Centre for Environmental Rights, Cape
	Town
	Phatshoane Henney Attorneys,
	Bloemfontein
For *Amici Curiae*:	
Mpukunyoni Community	
Mining Forum	D Sibuyi
The Association of Mine Workers	
and Construction Union	D Sibuyi
The National Union of Mineworkers	D Sibuyi
Instructed by	DMS Attorneys, Johannesburg
	Pieter Skein Attorneys, Bloemfontein

SSD