IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CC Case No: CCT 69/21

SCA Case No: 1105/2019

In the matter between:

GLOBAL ENVIRONMENTAL TRUST	First Applicant
MFOLOZI COMMUNITY ENVIRONMENTAL JUSTICE ORGANISATION	Second Respondent
and	
TENDELE COAL MINING (PTY) LIMITED	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-NATAL 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 NOTICE

PRESENTED FOR SERVICE AND FILING:

The first respondent's answering affidavit dated 16 March 2021.

DATED AT JOHANNESBURG on this the 16TH day of MARCH 2021.

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IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CCT CASE No CCT
SCA CASE No: 1105/2019

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THE ASSOCIATION OF MINE WORKERS AND CONSTRUCTION UNION	Amicus Curiae
THE NATIONAL UNION OF MINEWORKERS	Amicus Curiae

FIRST RESPONDENT'S ANSWERING AFFIDAVIT

I, the undersigned,

JAN CHRISTOFFEL DU PREEZ

do hereby make oath and say that:

1 I am the chief executive officer of the first respondent, Tendele Coal Mining (Pty) Ltd ("**Tendele**").

2 I am authorised to depose to this affidavit on behalf of Tendele.

3 The contents of this affidavit are, unless the context indicates otherwise, within my knowledge and are true and correct. Where I make legal submissions, I do so on the advice of Tendele's legal representatives.

OVERVIEW

4 The applicants ("**the Trust**") seek an order interdicting Tendele from conducting its mining operations at its Somkhele mine. The Trust contends that Tendele is mining without required statutory authorisations. That argument was dismissed by the High Court and Supreme Court of Appeal.

5 The Trust seeks leave to appeal against the order handed down by the Supreme Court of Appeal (case no. 1105/2019) on 9 February 2021 ("**the SCA Order**"). The SCA dismissed an appeal by the appellants against the order of Seegobin J, which likewise rejected the relief that was sought by the Trust ("**the High Court Order**").

6 The Trust asks this Court to substitute the SCA Order with an order:

6.1 upholding the appeal against the High Court Order;

6.2 declaring the commencement or continuation of mining operations by Tendele on specified properties unlawful and unconstitutional, unless and until it is granted environmental authorisation and/or section 24G authorisation in terms of the National Environmental Management Act, 197 of 1996 ("**NEMA**"), to undertake activities identified in regulations published on 4 December 2014 under sections 24(2) and 24(D) of NEMA;

6.3 suspending the declaration in respect of the properties where Tendele is currently mining for a period of 12 months, to allow Tendele to obtain authorisation under NEMA, but giving effect to the declaration immediately in respect of the properties where Tendele has not commenced mining; and

6.4 that costs be awarded against Tendele.

7 Owing to the relief that is sought, I am advised that the application for leave to appeal raises only two issues:

7.1 Do the facts pleaded by the Trust in the founding affidavit in the High Court implicate the cited sections of NEMA?

7.2 If so, and only if so, do these sections of NEMA apply to Tendele's activities at the Somkhele Mine?

8 If this Court answers either of these questions in the negative, the appeal falls to be dismissed.

9 As a result, the following substantive issues, traversed by the Trust in its founding affidavit as "*grounds of appeal*", are irrelevant to the appeal and can be disregarded:

9.1 whether Tendele had and/or required land use authority, approval or permission from any municipality having jurisdiction;

9.2 whether a waste management licence was issued, or was required to be issued, by the (then) Minister of Environmental Affairs under the National Environmental Management: Waste Act, 2008; and

9.3 the duties and conduct of Tendele relating to traditional graves located in the areas in which it mines.

10 On the two issues before this Court, I am advised that the Trust's appeal lacks prospects of success. It would accordingly not be in the interests of justice for this Court to grant leave to appeal. This is for two reasons:

10.1 First: as the Trust accepted in the application for leave to appeal before the High Court, and as the SCA majority held, the Trust's pleadings were fatally defective. Their affidavits do not contain factual allegations necessary to establish that Tendele is acting in breach of NEMA. The Trust never alleged that Tendele is engaged in any activities listed under sections 24(2) and 24(D) of NEMA.

10.2 The sections prohibit the commencement of listed activities. The list of activities referred to in these sections has been replaced and amended on several occasions, with new activities being added, the definition of certain activities being amended and with some activities being removed from the various lists.

10.3 Accordingly, any allegation that Tendele has breached section 24F(1)(a) of NEMA must, at a bare minimum, identify (a) the listed activity alleged to have commenced without environmental authorisation; and (b) the date on which that activity commenced.

10.4 Second: even if it had been established that Tendele is conducting listed activities, Tendele's activities are undertaken pursuant to valid mining rights and Environmental Management Programmes ("**EMPs**") granted by the Department of Mineral Resources and Energy, under the provisions of the Mineral and Petroleum Resources Development Act, 2002 ("**MPRDA**").

10.5 These rights and EMPs render Tendele's activities lawful in respect of two periods relevant to this appeal:

10.5.1 Prior to 8 December 2014, the environmental impacts of mining were regulated solely through the MPRDA and its requirement that mining right holders obtain and mine in accordance with an EMP.

10.5.2 After 8 December 2014, legislative amendments that require mining right holders also to have environmental authorisation

contain transitional provisions that provide that the environmental impacts of mining continue to be regulated by EMP's applied for before 8 December 2014.

10.6 Because Tendele is conducting its mining activities lawfully, consistently with its mining rights and EMPs, and because Tendele does not require any further authorisation under NEMA either for its current mining activities or for its proposed mining activities, the appeal lacks prospects of success.

11 Before dealing with the particular allegations contained in the Trust's affidavit, I answer the application thematically, under three headings:

11.1 Factual background.

11.2 Jurisdiction and leave to appeal.

11.3 Prospects of success.

FACTUAL BACKGROUND

12 Mining operations commenced in the Somkhele area in the mid 1880's.

13 Tendele began its operations in 2006 pursuant to various prospecting rights and subsequently pursuant to the grant of various mining rights and the approval of EMPs in terms of the MPRDA.

14 Tendele's mine comprises a single mining area on Reserve No. 3 (Somkhele) No. 15822. Its mining operations, however, are divided between five areas, and separate mining rights and separate EMP's apply to different areas:

14.1 The mining right in respect of area 1 was granted to Tendele on 21 May 2007. The EMP that is applicable to this mining right was approved on 22 June 2007.

14.2 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 that attaches to these rights was approved on 30 March 2011. Amendments to this EMP, to cater for the inclusion of KwaQubuka and Luhlanga, were approved on 29 May 2012.

14.3 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.

15 Until December 2020, Tendele was 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.

16 In December 2020 (and thus after the appeals in the High Court and the SCA were argued), Tendele commenced mining in an area known as "Box Cut Zero" situated in Area 1 and Area 9 (which forms part of the Luhlanga Area). Since this was pursuant to the grant of an environmental authorisation on 10 July 2020, the mining in this area is not relevant to this appeal.

17 Mining operations are not being undertaken in area 3. Mining operations ceased in area 2 in January 2012 due to the depletion of the anthracite reserves.

18 Mining operations have not started in areas 4 and 5.

19 Tendele needs to commence mining operations in two areas within areas 4 and 5 (namely the Emalahleni and Ophondweni areas) by September 2021 if it is to avoid the retrenchments of half its remaining workforce and by early to mid-2022 to avoid having to shut down its operations altogether. This is due to the depletion of the anthracite reserves in the areas where it is presently mining.

20 The effect of the relief the Trust seeks in respect of areas 4 and 5 would therefore be to close the Somkhele Mine, with catastrophic consequences.

20.1 Tendele is the primary employer in the Somkhele area. Thousands of people depend on the Somkhele Mine for their livelihood.

20.2 The Somkhele Mine is the primary driver of economic activity in Mtubatuba. It employs over 1000 people, 87% of whom reside in the impoverished Mpukunyoni area surrounding Somkhele.

20.3 The Somkhele Mine is one of the largest resources of open-pit minable anthracite in South Africa and is the principal supplier of anthracite to ferrochrome producers in South Africa. If the supply of anthracite from Somkhele were to cease, it is likely that local ferrochrome producers would be required to import its reductants 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.

20.4 The Mtubatuba Municipality's Integrated Development Plan recognises that mining is one of the major employment sectors in the municipality, and the majority of people working at the Somkhele Mine are locals. It

also records that in 2001 the unemployment rate in Mtubatuba Municipality was 59.7%. By 2011, there was a significant improvement to 39%, which was attributed to the coal mining operation at Somkhele.

20.5 Tendele has made significant investments in the development of the area in which it is mining including training in farming activities, adult basic education and training, the provision of student teachers, the provision of apprenticeships, and bursaries. Between December 2006 and December 2020, Tendele spent R1.452bn on local community employee salaries; R54m on community projects in accordance with approved social and labour plans attaching to the Tendele Mining Rights; and R688m on procuring services from community based Black Economic Empowerment companies as at December 2020.

21 A closure of the mine would result in the loss of all of these benefits to the Mpukunyoni community and would be the death knell of the Mtubatuba economy.

22 In this appeal, the Trust is seeking an order interdicting all mining operations at Tendele, until Tendele has obtained environmental authorisation under NEMA. I am advised that for the reasons articulated below, the High Court and SCA were correct in refusing to grant this relief.

JURISDICTION AND LEAVE TO APPEAL

23 Before addressing the merits of the appeal, I address this Court's jurisdiction and the question of whether the interests of justice warrant the merits being heard at all.

24 The Trust argues that the matter raises three constitutional issues:

24.1 First, the question whether environmental authorisation was required under NEMA involves the interpretation of NEMA in the light of section 24 of the Constitution.

24.2 Second, the SCA's approach to pleadings, namely, its finding that the Trust did not allege facts essential to sustain its claim, limits the right of access to court under section 34 of the Constitution.

24.3 Third, the High Court's costs order is inconsistent with *Biowatch.*

25 None of these issues found jurisdiction:

25.1 First, Tendele accepts that the interpretation of legislation embodying constitutional rights is a constitutional issue. However, because of the Trust' defective pleadings in the High Court, the proper interpretation of NEMA does not arise as an issue in this matter. It does not arise since the Trust never made averments required to sustain the claim that Tendele breached NEMA. Once this is so, I am advised, it follows that this Court lacks jurisdiction. As this Court explained in *Gcaba v Minister for Safety and Security and Others* 2010 (1) SA 238 (CC) at para 75:

> "*Jurisdiction is determined on the basis of the pleadings . . . and not the substantive merits. . . . In the event of the court's jurisdiction being challenged at the outset (in limine), the applicant's pleadings are a determining factor. They contain the legal basis of the claim under which the applicant has chosen to invoke the court's competence.*"

25.2 As this Court held in *J T Publishing (Pty) Ltd v Minister of Safety and Security 1997 (3) SA 514 (CC) at para 15*: *"[A] well established and uniformly observed policy . . . directs [courts] not to exercise it in favour of deciding points that are merely abstract, academic or hypothetical ones.*"

25.3 Second, the Trust does not put up any principled objection to the SCA's approach to the pleadings. It cites no error in law or principle. Its real objection is that the SCA applied the *Plascon-Evans* rule to the pleadings and made a factual finding against it. The majority of the SCA found that the Trust's affidavits lacked allegations necessary to make out a cause of action. As this Court held in *Jiba*, "*It is now axiomatic that if what is at issue in a particular case is the determination of facts, the jurisdiction of this Court is not engaged.*"[1]

25.4 Third, Tendele has abandoned the costs order made in its favour by the High Court. The principles regarding costs orders are well-established, and there is accordingly no reason to hear the appeal on this basis alone.

26 I accordingly submit that this Court's jurisdiction is not engaged. For the reasons that follow, the appeal nonetheless lacks prospects of success.

[1] *General Council of the Bar of South Africa v Jiba and Others* (CCT192/18) [2019] ZACC 23; 2019 (8) BCLR 919 (CC)

NO PROSPECTS OF SUCCESS

27 For the relief sought by the Trust to succeed, it must succeed in establishing one proposition of fact and one of law:

27.1 As a matter of fact, it must be established that Tendele is carrying out listed activities as contemplated in section 24F(1)(a) of NEMA. The date of commencement of the listed activity is critical in order to determine whether its commencement was prohibited by NEMA.

27.2 Only if the factual proposition is determined in the Trust's favour, does the legal question of whether section 24F(1)(a) is applicable to Tendele arise.

28 In respect of both, however, the Trust has no prospect of success:

28.1 The majority of the SCA dismissed the appeal because the Trust failed to make the necessary allegations, either in the founding or replying affidavits. In reaching this conclusion, I am advised, the SCA was right and that there are no prospects of success in respect of this question of fact.

28.2 In any event, the Trust has no prospects of success in respect of the question of law. Properly interpreted, section 24F(1)(a) of NEMA does not apply to Tendele's activities which were commenced with or approved before the commencement of the One Environmental System on 8 December 2014. This does not mean, as the Trust dramatically but mistakenly asserts, that no environmental safeguards exist in respect of these activities. They do. The safeguards are

derived from the MPRDA, which the Trust omits to mention, was also enacted to give effect to section 24(b) of the Constitution and which regulated the environmental impact of mining in its entirety. Because NEMA does not apply, the relief sought in the notice of motion cannot be sustained. Thus, the Trust has no prospects of success on the issue of law either.

Pleadings: failure to identify listed activities

29 The Trust contends that Tendele is mining unlawfully because no environmental authorisation as contemplated by NEMA has been issued to Tendele in respect of its mining operations.

30 But the question of whether Tendele was required to obtain an environmental authorisation as required by section 24F(1)(a) of NEMA does not arise on these pleadings because the appellants failed to allege that Tendele is conducting any activities specifically regulated under NEMA.

31 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 section 24(2)(a) and (d) of NEMA.

32 Acting in terms of this section (and its predecessor, section 21 of the Environment Conservation Act 73 of 1989 ("**ECA**")), the Minister of Environment, Forestry and Fisheries has identified listed activities.

33 Since 5 September 1997,[2] when the first list was published, until the most recent list was published on 4 December 2014,[3] the list of activities has been replaced and amended on several occasions, with additional activities being added, the definition of certain activities being amended, and some activities being removed from the various lists. Mining and mining related activities were only identified as a listed activity in regulations which came into effect on 8 December 2014.

34 The prohibition in section 24(2)(a) is on the commencement of an activity, not on its occurrence or continuation.

35 As a result, any allegation that Tendele has breached the prohibition contained in section 24F(1)(a) of NEMA must, at a bare minimum, identify (a) the listed activity alleged to have commenced without environmental authorisation; and (b) the date on which that activity commenced.

36 In the founding affidavit, the Trust did not plead the listed activities that Tendele was alleged to be undertaking without the requisite environmental authorisation. The sum total of their evidence relating to these alleged activities is 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)."*[4]

37 When Tendele pointed out in its answering affidavit that authorisation under any environmental legislation was not required for mining operations or activities directly related thereto which had commenced or was authorised prior to 8

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[2] GNR 1182, published in GG 18261 on 5 September 1997 (as amended).

[3] GNR 983, 984 and 985, published in GG 38282 on 4 December 2014 (as amended)

[4] SCA Order at para 109.

December 2014, when the One Environmental System Commenced, the Trust replied: "*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.*"[5]

38 But annexure R1 merely contained a list of the activities requiring environmental authorisation under NEMA.

39 The Trust made no effort at all, even in reply, to identify the activities that they allege Tendele is undertaking, nor when Tendele is alleged to have commenced them. Nor did they ever invite Tendele to inform them of the facts in this regard, either in the correspondence leading to the litigation or the founding affidavit.

40 From this, the majority for the SCA held that:

40.1 The founding affidavit lacks the necessary allegations to sustain this ground of unlawfulness;[6]

40.2 the Trust failed to identify the listed activities that Tendele is alleged to be undertaking and they also failed to allege when Tendele commenced them;[7] and

40.3 therefore, 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.[8]

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[5] SCA Order at paras 110-111.

[6] SCA Order at para 107.

[7] SCA Order at para 111.

[8] SCA Order at para 107.

41 Before this Court, the Trust advances a further argument in an effort to avoid this defect in the pleadings.[9] The argument is identical to the argument made before the SCA, which that Court summarised accurately as follows:

> "*On appeal, the appellants try to . . . [cast] 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.*"[10]

42 This fails for these reasons:

42.1 the affidavits never indicated that the Trust understood it to be common cause that listed activities are taking place or what those listed activities are;

42.2 the affidavits never indicated a lack of adequate knowledge as to which activities were occurring at Somkhele; and

42.3 it does not assist the Trust to argue that Tendele ought to have supplied the missing allegations because these facts were in Tendele's peculiar knowledge. The Trust failed to allege anything at all, so Tendele had no duty to supply these facts.[11]

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[9] FA at paras 109-117.

[10] SCA Order at para 113.

[11] SCA Order at para 114.

43 Since the Trust failed to aver essential facts to sustain their cause of action, the issue of the proper interpretation of NEMA did not arise.[12]

44 Because there are no prospects of success on appealing this issue, it follows that this appeal must be dismissed.

Environmental authorisation under NEMA is not required for Tendele's mining and mining related activities

45 Even if the facts had been properly pleaded, I am advised that Tendele did not and does not require environmental authorisation in terms of NEMA for its mining and mining related activities:

45.1 Tendele's current activities (those activities which were already being conducted before the One Environmental System was brought into effect on 8 December 2014) are not subject to the requirement to obtain an environmental authorisation under NEMA because at the time that they commenced the environmental impacts of mining activities and activities incidental thereto were regulated exclusively through the MPRDA and in particular through the requirement under that Act to obtain an EMP prior to commencing mining and to ensure that mining takes place in accordance with an approved EMP.

45.2 Tendele's proposed mining activities and activities incidental thereto (those which have yet to commence in terms of the 2016 mining right) are catered for by the transitional provisions contained in the NEMA Amendment Act 62 of 2008 and the 2014 Environmental Impact

[12] SCA Order at para 115.

Assessment Regulations published under NEMA. In terms of these provisions, because Tendele's applications for the 2016 mining right and the associated EMP were pending at the time the One Environmental System commenced, they fell to be adjudicated on the basis of the law as it was under the old regime.

46 As a consequence:

46.1 In respect of area 1 and the extended area of area 2, authorisation is not required because mining as well as any activities ancillary thereto commenced before the introduction of the One Environmental System in December 2014. At that time, the environmental impacts of mining were regulated exclusively through the MPRDA and in particular through the requirement under that Act to obtain an EMP prior to commencing mining, and to ensure that mining takes place in accordance with an approved EMP.

46.2 Tendele also does not require authorisation for its proposed mining and mining related activities in areas 4 and 5. This is because the EMP related to that mining right was submitted prior to the introduction of the One Environmental System on 8 December 2014 and, by virtue of the transitional provisions in the legislation giving effect to the new system, that EMP and the activities undertaken pursuant to it, are governed by the law as it was prior to 8 December 2014.

*Authorisation was not required for Tendele's **current** activities*

47 As mentioned above, at the time the appeals in the High Court and the SCA were

argued, Tendele was only actively mining in area 1 and the extended area of area 2, namely the KwaQubuka and Luhlanga areas. The mining rights and EMPs in respect of these areas were granted and approved prior to the commencement of the One Environmental System on 8 December 2014.

48 I am advised that there can be no real dispute that prior to 8 December 2014 an environmental authorisation under NEMA was not required for mining activities *per se*. This is so for the following reasons:

48.1 Firstly, because section 5A(a) (which provides that no person may, *inter alia*, mine without an environmental authorisation) had not yet been introduced into the MPRDA.[13] At that stage the relevant section of the MPRDA (section 5(4)(a)) provided that no person may, *inter alia*, mine without an approved EMP.[14]

48.2 Secondly, because it was only with the coming into operation of the 2014 EIA regulations and the various listing notices published in terms of section 24(2) of NEMA on 8 December 2014, that the commencement of mining *per* se required an environmental authorisation in terms of NEMA.

49 Moreover, activities incidental to mining (like the development of roads, the construction of dams or the clearance of indigenous vegetation), also did not require an environmental authorisation in terms of NEMA in addition to a mining right and EMP in terms of the MPRDA because prior to 8 December 2014, the

[13] Section 5A was introduced into the MPRDA on 8 December 2014 by virtue of section 5 of Act 49 of 2008.

[14] Section 5(4) was deleted at the same time as section 5A was introduced, namely on 5 December 2014 in terms of Act 49 of 2008.

environmental impacts of mining and activities incidental to mining were regulated exclusively through the MPRDA. This is evident from a proper interpretation of the scope and effect of the MPRDA and NEMA and the interaction between these statutes.

50 The Trust seeks an order declaring that the commencement or continuation of Tendele's mining operations is unlawful and unconstitutional in respect of all of the areas in which Tendele has and intends conducting its mining and related activities until Tendele has obtained environmental authorisation in terms NEMA or *ex post* facto approval under section 24G of NEMA. This relief presupposes that all of Tendele's mining operations are unlawful unless Tendele has an environmental authorisation under NEMA, regardless of when Tendele commenced with its activities. As outlined above, mining *per se* was not a listed activity prior to 8 December 2014, being the date on which the relevant listing notice was published in terms of section 24(2) of NEMA. [15] This is conceded by the Trust.[16] Consequently, the Trust cannot seek an order declaring the commencement or continuation of Tendele's mining operations to be unlawful and unconstitutional without environmental authorisation or consent under section 24G. At best, the Trust can seek an order declaring that the commencement or continuation of specified listed activities by Tendele is unlawful and unconstitutional unless an environmental authorisation or section 24G consent has been obtained, considering the wording of section 24F(1)(a) of

[15] Activity 17 in Appendix 1 to GNR.984 of 4 December 2014: Environmental Impact Assessment Regulations Listing Notice 2 of 2014 (Government Gazette No. 38282)

[16] Para 100 of the affidavit of Sifiso Senzo Dladla.

NEMA (which order cannot in any event be sought by the Trust for the reasons outlined in this affidavit).

51 The rhetorical premise underpinning the Trust's appeal, namely, that Tendele's position means that it conducts mining without any regard to its environmental impact, is false. This is for the following reasons:

51.1 Both NEMA and the MPRDA were enacted to give effect to section 24(b) of the Constitution.

51.2 In enacting the MPRDA, the legislature covered the field as far as the environmental impacts and management of mining are concerned. In doing so, it made the implementation of the MPRDA subject to the pre-existing principles of NEMA but left their interpretation and decision making in the hands of the functionaries of the Department of Mineral Resources and Energy, in accordance with the MPRDA as well as the regulations promulgated in terms thereof.

51.3 The tool through which the MPRDA regulated the environmental impact of mining was the requirement contained therein for holders of mining rights to obtain and mine in accordance with an EMP.

51.4 Importantly, the procedure for submission and approval of EMPs and the core content of EMPs comprehensively give effect to the principles in NEMA and section 24(b) of the Constitution and required compliance with the minimum requirements for environmental assessments set out in section 24(7) of NEMA.

52 This is why Tendele did not require additional environmental authorisation under

NEMA for its mining activities in areas 1 and the extended area of 2. The environmental concerns that NEMA seeks to address are already addressed through the EMP.

53 Ultimately, the Trust's environmental concerns, though important and legitimate, rely on an incorrect understanding of the relationship between the MPRDA and NEMA in dealing with mining operations that pre-dated the commencement of the One Environmental System.

*Authorisation is not required for Tendele's **proposed** activities*

54 The same errors inform the Trust's concerns regarding Tendele's proposed mining activities.

55 Tendele submitted its application for the areas 4 and 5 mining right on 13 June 2013 and submitted its EMP for approval on 9 May 2014. Both dates preceded the commencement of the One Environmental System on 8 December 2014.

56 The introduction of the One Environmental System contained certain transitional arrangements.

57 Section 12(7) of the NEMA Amendment Act provides:

> "*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.*"[17]

[17] Act 62 of 2008. Section 12(7) was introduced into the NEMA Amendment Act by the National Environmental Management Laws Amendment Act 25 of 2015 with effect from 2 June 2014. The date that is referred to in section

58 A similar transitional provision was included in Regulation 54(1) of the 2014 EIA Regulations, which came into effect on 4 December 2014:

> *"An application submitted in terms of the previous MPRDA regulations and which is pending when these Regulations take effect must despite the repeal of those regulations be dispensed with in terms of those previous MPRDA regulations as if those previous MPRDA regulations were not repealed."*

59 The effect of these transitional provisions is that both Tendele's application for a mining right and its application for the approval of its EMP fell to be adjudicated on the basis of the law as it was prior to the implementation of the One Environmental System on 8 December 2014.

60 As explained above, prior to 8 December 2014, environmental authorisation in terms of NEMA was not required for mining and mining related activities.

61 Since Tendele did not and does not require further environmental authorisation in terms of NEMA for its mining and mining related activities, the relief sought by the Trust cannot be sustained, for it is premised on an error of law.

62 I am advised that are no reasonable prospects of success on this issue, which means that this appeal must be dismissed.

63 The Trust says that there are conflicting judgments of the High Court on this issue. They say that Rogers J in *Mineral Sands*, and Davis J in *Mining and Environmental Justice Community Network of South Africa*[18] reached the

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14(2)(b) of the National Environmental Management Amendment Act, 2008, is commonly accepted as being 8 December 2014, being the date 18 months after the date of commencement of the MPRDA Amendment Act, 2008.

[18] *Amicus* HOA para 25 referring to *Mining & Environmental Justice Community Network of South Africa and others v Minister of Environmental Affairs and others* [2019] 1 All SA 491 (GP)

opposite conclusion to that of the court a quo. They go so far as to submit that, because of the judgment of Seegobin J, it is now permissible to mine without any environmental authorisation in KwaZulu-Natal; while in Gauteng and the Western Cape, mining requires an environmental authorisation.[19]

64 This is incorrect:

64.1 Seegobin J did not find that it is permissible to mine without environmental authorisation. He found that, for mining operations which pre-dated the coming into effect of the One Environmental System, the environmental impacts of mining are regulated through the MPRDA rather than NEMA.

64.2 This issue has never been decided by any division of the High Court. The two decisions relied on by the applicant are not authority for the proposition the applicant contends for.

65 In *Mineral Sands*, Rogers J made an obiter statement to the effect that "*a company intending to embark on mining would typically have had to perform activities which were listed activities.*"[20] But in that case:

65.1 The statement relied upon at paras 7 to 8 of the judgment was *obiter* in the context of the judgment as a whole. The judgment related to the validity of a search warrant issued by a magistrate against a mining company.

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[19] Founding affidavit paragraphs 39 to 40.

Mineral Sands Resources v Magistrate for the District of Vredendal and Others [2017] 2 All SA 599 (WCC) at para 7.

65.2 The proposition, which is repeated at paragraph 17, appears only in Rogers J's summary of the legislative environment and was not one of the findings upon which the validity of the search warrant depended. Rogers J set aside the search warrants that had been granted for different reasons entirely. His findings in relation to the requirement of obtaining an environmental authorisation were accordingly *obiter dicta* and not binding statements of the correct interpretation of the statutes.

65.3 Nor does the issue seem to have been argued in any detail before him and the statements in his judgment are not supported by any detailed reasoning.

65.4 Rogers J's summary of the relationship between an EMP approved under the MPRDA, which he states "*effectively constituted the environmental authorisation to conduct the mining activity*",[21] and an environmental authorisation under NEMA, ignores the provisions included in the MPRDA at the time for consultation between the designated authority under the MPRDA and the competent authority in terms of NEMA in the consideration of EMP's. This provision, it is submitted, was intended to avoid the untenable situation where holders of mining rights would potentially face competing and contradictory but mandatory directions from two authorities in respect of the same activity.

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[21] *Mineral Sands Resources (supra) at para 17.*

66 The other judgment relied on is the decision of Davis J in *Mining and Environmental Justice Community Network of South Africa.*[22] But in that decision, Davis J made no finding whatsoever about the interaction between the MPRDA and NEMA prior to the enactment of the One Environmental System. The entire case arose in a post-One Environmental System context, notwithstanding Davis J's reference to section 39 of the MPRDA which had been repealed by the time the dispute in the matter arose. In any event, the summary of the statutory framework does not constitute part of the *ratio* of his judgment and certainly does not amount to a reasoned or considered finding in support of the proposition the Trust contends for.

THE IMPLICATIONS OF ANY ORDER ON THE MINING INDUSTRY GENERALLY

67 In the event that this Court finds that an environmental authorisation was required to be obtained or applied for by Holders (as defined in section 1 of the MPRDA) of rights applied for or granted in terms of the MPRDA prior to the introduction of the One Environmental System on 8 December 2014, such a finding would have significant implications for the mining industry.

67.1 Firstly, mining companies that did not obtain environmental authorisation in terms of NEMA for listed activities prior to 8 December 2014 but have already commenced with those activities would be obliged to apply, in terms of section 24G of NEMA, for *ex post* facto consent. The applicant would be obliged to pay an administrative fine of up to R5 million and section 24G(6) of NEMA provides that the

[22] *Mining & Environmental Justice Community Network of South Africa and others v Minister of Environmental Affairs and others* [2019] 1 All SA 491 (GP)

submission of any application in terms of section 24G of NEMA does not derogate from –

67.1.1 the environmental management inspector's or the South African Police Services' authority to investigate any transgression in terms of NEMA (section 24G6(a)); or

67.1.2 the National Prosecuting Authority's legal authority to institute any criminal prosecution against the applicant (section 24G(6)b)).

67.2 Secondly, where a Holder of a MPRDA right has an approved EMP but has not commenced a specific listed activity under NEMA which it is required to undertake as part of its mining activities (the impacts of which have already been assessed in its approved EMP), the Holder would not be permitted to commence with such activity without first obtaining environmental authorisation. This would wreak havoc on mine planning and the continuation of production and may ultimately lead to retrenchments or a mine having no alternative but to close indefinitely. An application for an environmental authorisation can take, at a minimum, 12 months to obtain. Mines can ill afford to have operations come to a standstill for such an extended period while awaiting the processing and grant of an environmental authorisation.

AD SERIATIM **RESPONSE**

68 Below, I provide *seriatim* responses to specific paragraphs in the Trust's affidavit. To the extent that I do not expressly admit or deny an allegation in the affidavit,

or to the extent that an allegation is inconsistent with this answering affidavit, it is denied.

69 I note at the outset that there appear to be two typographical errors in paragraph 3.2.3 of the notice of motion:

69.1 First, it appears that paragraph 3.2.3 intended to cross refer to paragraph 3.2.1 (d); and

69.2 Second, it appears that paragraph 3.2.3 intended to say "insofar as it relates to Areas 4 and 5" (because paragraph 3.2.1(d) does not relate to Area 3 but to Areas 4 and 5).

Ad paragraphs 1 to 3

70 Save to deny that the factual and legal submissions in the affidavit are true and correct, the content of these paragraphs is admitted.

Ad paragraphs 4 to 18

71 The particulars of the different parties and their involvement in the High Court and Supreme Court of Appeal are admitted.

Ad paragraphs 20 to 25

72 It is admitted that section 24 and section 38 of the Constitution were relevant to the proceedings before the High Court and Supreme Court.

73 It is also admitted that one dispute between the parties (namely the application of NEMA to mining and mining related activities prior to the commencement of the One Environmental system) concerns the interrelation between and

interpretation of various legislative instruments, and consequently of Tendele's rights and duties thereunder.

74 In addition to this interpretative dispute, though, the parties and courts were also concerned with the question whether the founding affidavit makes the averments necessary to sustain the cause of action on which the Trust relied in support of the relief sought.

Ad paragraphs 26 and 27

75 It is admitted that issues relating to land use, waste management and relocation of graves were relevant in the High Court and SCA.

76 For the reasons articulated above, namely, the nature of the relief sought by the Trust being limited to NEMA, these issues are not relevant to this appeal. Indeed, I note the Trust specifically says here that it approaches this Court to reverse the judgment of the SCA on the issue of NEMA's applicability to parties like Tendele, whose mining rights were awarded before 8 December 2014.

Ad paragraphs 28 and 41

77 The SCA's finding regarding the Trust's pleadings is admitted, but for the reasons articulated above, it is denied that:

77.1 the SCA erred in its construction of the pleadings;

77.2 this raises a constitutional issue; and

77.3 the particular application of established principles relating to pleadings to the facts of this matter can, without more, raises a matter of general

public importance.

Ad paragraphs 29 to 32

78 It is admitted that mining and mining related activities can have an impact on the environment.

79 For this reason, the MPRDA, consistently with and in the spirit of section 24 of the Constitution and NEMA, required parties like Tendele to obtain EMPs prior to the commencement of these activities and to mine in accordance with such EMP's.

80 The suggested implication by the Trust that absent NEMA authorisation Tendele is free to destroy, damage, harm and exploit the environment and inhabitants of the land, I am advised, is knowingly and perniciously false.

81 Tendele has never been intransigent. It sought and obtained valid EMPs. At no point does the Trust seek to impugn the protective capacity of these legislative measures. Instead, it wants this Court to impose on Tendele a further, duplicate requirement, which is unnecessary to ensure that the environmental impacts of mining are sufficiently regulated.

Ad paragraphs 39

82 I again deny that the absence of NEMA authorisation exposes the environment or the Somkhele community to harm. The legitimate, constitutional interests of both were comprehensively and adequately catered for by the requirement that Tendele obtain an EMP.

Ad paragraphs 42

83 The High Court's cost order has been abandoned. Moreover, since the principles regarding costs orders are well-settled, it is incorrect that the order will have any effect on other parties, chilling or otherwise.

Ad paragraphs 44 to 54

84 The environmental, aesthetic and human significance of the land adjacent to and in which Tendele has mining rights is readily admitted.

85 For this reason, Tendele sought and was granted valid EMPs.

86 Neither the community nor the environment face "*destruction*". To the extent that mining inevitably has environmental impacts, such impacts in this case do not arise from regulatory non-compliance. The Trust's claim otherwise is not borne out of the facts or the law.

Ad paragraph 55 to 58

87 For the reasons articulated above, it is denied that:

87.1 it was ever contended that the Trust lacked any information about Tendele's activities;

87.2 Tendele had a duty, *inter alia*, to provide this information, or specifically respond to anything in this correspondence.

88 Indeed, the correspondence that is referred to in these paragraphs did not involve Tendele at all, but rather various government departments.

Ad paragraph 59

89 It is denied that Tendele's answer to the allegations of unlawfulness, namely, the

applicability of the ECA and NEMA to its activities, can be used to infer that it had admitted that it was engaged in listed activities. There is no basis on the papers or in principle to infer this conclusion.

Ad paragraphs 61 to 68

90 To the extent that these paragraphs accurately track the High Court and SCA proceedings and Orders, they are admitted.

Ad paragraphs 69 to 91

91 For the reasons articulated above, it is denied that this Court has jurisdiction to hear this appeal and that it is in the interests of justice to do so.

92 Moreover, for the reasons articulated above, it is denied that:

92.1 the High Court's interpretation of the relationship between NEMA and the MPRDA frustrates Parliament's effort to give effect to the right to an environment that is not harmful to health;

92.2 the SCA, having judged the pleadings to be fatally defective, ought to have decided that interpretative question. As explained, courts do not exist to decide abstract or hypothetical questions of law, but only legal issues as they present themselves on properly pleaded papers. I am advised that this Court's jurisprudence does not support the Trust's argument otherwise;

92.3 the SCA's approach to pleadings was inconsistent with principle and therefore contrary to section 34 of the Constitution. The Trust makes no argument in support of the claim otherwise, but ultimately rests its

objection on its dissatisfaction with the SCA holding it to account for its defective pleadings; and

92.4 the existence of conflicting High Court judgments or the importance or clarity of a legal question are, by themselves sufficient to engage this Court's jurisdiction.

Ad paragraphs 92 and 122 and 144

93 For the reasons articulated above, it is denied that this appeal raises the question of whether Tendele was obliged to seek further authorisations regarding graves, town planning, and waste management.

94 These issues do not arise because they do not bear on the relief that is sought in the Trust's notice of motion. In relevant part, the Trust is seeking an order that declares the commencement or continuation of mining operations by Tendele on specified properties unlawful and unconstitutional, unless and until it is granted authorisation under NEMA.

95 The question of the legality of Tendele's activity regarding graves, town planning, and waste management has no relation to the lawfulness of activities insofar as NEMA is concerned.

Ad paragraphs 93 to 108

96 For the reasons articulated above, the legal arguments in these paragraphs are denied.

97 Without derogating from the generality of the aforesaid, it is specifically denied that:

97.1 the authorisation requirements of NEMA apply to Tendele's activities, either before or after 8 December 2014; and

97.2 the absence of NEMA authorisation undercuts the protections that are afforded by section 24 of the Constitution.

Ad paragraphs 109 to 121

98 For the reasons articulated above, the legal arguments made, and conclusions arrived at, in these paragraphs are denied.

99 In short, the Trust failed to make essential averments in the papers. They did not do so in their founding affidavit. Even if it were permissible to do so, which is denied, they failed to make these averments in their reply. Having failed to substantiate factually a legal claim based on the applicability of NEMA, the application was fatally defective. This is what the High Court and majority of the SCA held. They were correct.

Ad paragraphs 145 to 149

100 As the Trust records, Tendele has abandoned the High Court costs order. There is no reason to hear this appeal merely to set aside that order.

JAN CHRISTOFFEL DU PREEZ

I hereby certify that the deponent knows and understands the contents of this affidavit and that it is to the best of the deponent's knowledge both true and correct. This affidavit was signed and sworn to before me at Bryanston on this the 16 day of **MARCH 2021**, and that the Regulations contained in Government Notice R.1258 of 21 July 1972, as amended by R1648 of 19 August 1977, and as further amended by R1428 of 11 July 1989, having been complied with.

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