

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

Case No: 11488/17P

In the matter between:

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

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

I, the undersigned

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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. The facts set out in this affidavit are, unless otherwise stated or the contrary appears from the context, within my personal knowledge and are both true and correct.
3. Certain of the facts in this affidavit were related to me by Jarmi Steyn, Tendele's chief operating officer. I attach an affidavit from Steyn, confirming the facts contained in this affidavit marked "**TCM1(a)**". Where I express views on a legal matter, I do so on the advice of Tendele's legal advisors which advice I believe to be correct.
4. I depose to this affidavit in answer to the founding affidavit deposed to by Sabelo Dumisani Dladla ("**Dladla**") on behalf of the applicants.
5. Before dealing with the allegations contained in Dladla's affidavit directly, I will set out in brief the basis of Tendele's opposition to the relief sought by the applicants in this application. Thereafter I will set out the relevant factual background to Tendele's mining operations, including the history of the Somkhele mine and the various rights that have been granted to

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Tendele to conduct its mining operations. I will then deal with the applicants' allegations to the effect that Tendele's mining operations are unlawful and I will show that these allegations are wholly unfounded and incorrect. I will then address the interdictory relief sought by the applicants and will demonstrate that the applicants have not satisfied any of the requirements for such relief. Finally, and to the extent necessary, I will deal with the specific allegations made by Dladla in the founding affidavit.

SUMMARY OF OPPOSITION

6. The applicants seek final relief against Tendele to prevent it from continuing mining operations at its Somkhele mine.
7. Mining operations commenced in the Somkhele area in the mid-1880's and Tendele commenced its mining operations in 2007.
8. The Somkhele mine is one of the largest resources of open-pit mineable anthracite in South Africa and is the principal supplier of anthracite to ferrochrome producers in South Africa.
9. The Somkhele mine employs over 1000 people, with 83% of employees residing in the impoverished Mpukonyoni Area surrounding Somkhele. In addition, the mine contributes massively to the upliftment of the area through training initiatives and the procurement of services from local entrepreneurs. In 2015, Tendele concluded a R350,000,000.00

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transaction giving local communities surrounding Somkhele as well as Tendele employees a 20% stake in Somkhele. The Somkhele mine's contribution to the local economy is recognised in the current Mtubatuba Local Municipality Integrated Development Plan which acknowledges that the mine has significantly improved unemployment in the municipal area.

10. The applicants allege that Tendele's current mining operations are unlawful because Tendele –

10.1. has no environmental authorisation issued in terms of section 24 of the National Environmental Management Act 107 of 1998 ("**NEMA**");

10.2. has no land use authority, approval or permission from any municipality having jurisdiction;

10.3. has no waste management licence issued by the Minister of Environmental Affairs (the fourth respondent) in terms of section 43 of the National Environmental Management: Waste Act 59 of 2008 ("**Waste Act**"); and because Tendele

10.4. has no written approval in terms of section 35 of the Kwa-Zulu Natal Heritage Act 4 of 2008 ("**KZN Heritage Act**") to damage, alter, exhume or remove any traditional graves from their original position.

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11. There is no basis for these allegations.
12. Tendele's operations are undertaken pursuant to, *inter alia*, valid mining rights and environmental management programmes ("**EMPs**") granted and approved by the Department of Mineral Resources. The legislative amendments introduced in December 2014, which gave effect to the "One Environmental System" and which require mining right holders also to have environmental authorisation for their operations, contain transitional arrangements which provide for the continuation of mining operations lawfully conducted prior to the amendments. By virtue of these provisions, Tendele's mining operation remain lawful notwithstanding that no environmental authorisation has been issued pursuant to the new dispensation.
13. The applicants' complaint that Tendele lacks the requisite municipal approval for its operations is equally devoid of merit. Not only has Tendele in fact obtained such approval (as even the applicants acknowledge), but upon analysis of the relevant land use planning legislation, it is evident that such legislation also provides for the continuation of historical mining operations such as those undertaken by Tendele. The Somkhele mine is accordingly operating lawfully, in compliance with all applicable land use planning legislation.
14. The same applies to the applicants' complaint that Tendele's operations are unlawful because they are being undertaken in the absence of a waste

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management licence as (allegedly) required in terms of the Waste Act. The transitional provisions of this Act provide specifically for the continuation of such activities provided they were being lawfully undertaken prior to the commencement of the provisions in Waste Act applying to residue stockpiles and residue deposits. Thus, even assuming that Tendele is conducting activities which would require such a licence, the fact that the activities were being conducted lawfully in terms of environmental management programmes approved by the Department of Mineral Resources in terms of the prevailing legislation, means that they may continue by virtue of the transitional provisions. Accordingly, there is no requirement for Tendele to have a waste management licence for its continued operations.

15. As regards the applicants' criticisms of Tendele's conduct in regard to the relocation of traditional graves, 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 (the ninth respondent). However, it did so following lengthy consultation with the families concerned. Tendele has since engaged in extensive consultations and negotiations with the affected communities and Amafa in an effort to ensure that its continued conduct in relation to traditional graves is wholly within the law. In this regard and since April 2017, Tendele has been working in close collaboration with Amafa and a comprehensive procedure has been established, which Tendele is already complying with, for all future relocations of traditional graves.



Notwithstanding the above, the applicants' complaints could not conceivably entitle them to an interdict that would shut down Tendele's entire mining operation. At best, it could only entitle them to relief sufficient to protect the particular graves that they allege were damaged or altered.

16. In order to obtain the final interdictory relief that they seek, the applicants are required to demonstrate a clear right, an injury actually committed or reasonably apprehended and the absence of similar protection by any ordinary remedy. Even if the version of the facts and the law set out in the founding affidavit were correct (which is denied) the applicants have failed to satisfy any of these requirements.
17. To the extent that the applicants rely on the alleged unlawfulness of Tendele's operations to demonstrate a clear right, the applicants fail at the outset as Tendele's operations are lawful as stated above (and further detailed below). Furthermore, even if certain of Tendele's operations were unlawful (which is denied) this would not in itself give the applicants a clear right to seek final interdictory relief against Tendele.
18. The applicants have failed to demonstrate an injury actually committed or even a reasonable apprehension of irreparable harm. Their allegations of harm are unsubstantiated, speculative and incorrect. On the contrary, the harm that would be caused, not only to Tendele but also to the broader Mtubatuba economy, not least the loss of livelihood of all those (and their families) who rely on the Somkhele mine for employment or the provision



of services, far outweighs the non-specific and generalised allegations of alleged harm that the applicants are allegedly suffering because of the mining.

19. To the extent that the applicants allege that Tendele's mining operations are unlawful, they have not sought to compel the relevant departments to take action against Tendele nor have they engaged with Tendele in a constructive manner to reach an accommodation wherein their rights and Tendele's right to mine in accordance with its mining rights and EMPs are protected.. They have accordingly failed to demonstrate that they have no alternative means of addressing their concerns.
20. In the result, the applicants have failed to satisfy the requirements for the final interdictory relief which they seek and their application accordingly falls to be dismissed.

THE FACTUAL BACKGROUND

An introduction to the Somkhele mine

21. The Somkhele mine ("**Somkhele**") 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, Kwa-Zulu Natal Province.



22. A map showing the location of the Somkhele mine is attached marked "TCM1".
23. Although mining operations commenced in the Somkhele area in the mid-1880's, Tendele commenced mining operations at the Somkhele mine in 2006.
24. 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.
25. 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.
26. The production of ferrochrome requires anthracite that is low in sulphur and phosphorus which is in increasingly short supply in South Africa. Tendele is 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

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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.

27. For this reason, the continued mining of anthracite at Somkhele is critical for ensuring the continuation of affordable ferrochrome production in South Africa.

The socio-economic context of the Somkhele mine

28. Somkhele mine has had a significant and positive impact on the communities surrounding the mine through, *inter alia*, investment, training and job creation.
29. Tendele currently employs over 1000 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 1000 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.

30. 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)"*.
31. 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."*
32. 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.



33. To date, 800 households in the Mpukunyoni Area have received training in farming activities through an initiative introduced by Tendele. 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.
34. 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 maths and science programmes for school children, matric study support and Tendele provides student teachers in community schools to assist with education. 16 apprentices have completed learnerships at Somkhele, 7 of which have been employed at Somkhele. To date, 817 people have obtained National Certificates: N1 - 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. 84 bursaries were awarded by Tendele between 2008 and 2017.
35. Between December 2006 and December 2016, Tendele spent –



- 35.1. R719,000,000.00 paying local community employee salaries;
 - 35.2. R54,000,000.00 on community projects in accordance with approved Social and Labour Plans attaching to each of the Tendele Mining Rights; and
 - 35.3. R300,000,000.00 on procuring services from community based black economic empowerment companies.
36. In addition, Tendele has, *inter alia* –
- 36.1. constructed new homes, with water as well as sewerage and electricity infrastructure for community members that were required to be relocated by Tendele;
 - 36.2. provided local communities with potable water delivered by water tanker since 2015, at a cost of R100,000.00 a month, as the Mtubatuba Municipality is unable to provide water to certain areas surrounding Somkhele;
 - 36.3. constructed the Siphelele Primary School and a soccer field, at a cost of approximately R10,000,000.00, and assisted with the provision of teachers as well as basic maintenance and water (when required);

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- 36.4. constructed the Somkhele Maternity ward at the Somkhele clinic at a cost of R3,500,000.00 after consultation the Department of Health;
- 36.5. constructed large community halls in Dubelenkunzi, Machibini, KwaMyeki and Esiyembeni (which are community areas surrounding Somkhele); and
- 36.6. constructed community roads and bridges.
37. In 2015, Tendele concluded a R350,000,000.00 transaction giving local communities surrounding Somkhele as well as Tendele employees a 20% stake in Somkhele. As a consequence, 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.
38. A further recent development that should be highlighted is the establishment in early 2017 of a community structure, known as the Mpukunyoni Community 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

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non-profit organisations operating in the Mpukunyoni Area and representatives of the Mtubatuba Municipality.

39. The MCMF represents the interests of the communities in the Mpukunyoni Area in respect of the mining operations undertaken at Somkhele and has the following representatives (amongst others) –

39.1. the Inkosi (representing the 8 Royal Houses (related to the Zulu King) of the Mpukunyoni Area, the Traditional Council and the Traditional Authority);

39.2. the Indunankulu, Chief Induna of the Mpukunyoni Area;

39.3. the Mayor of the Mtubatuba Municipality (or his / her nominee), in his/her capacity representing the entire Mtubatuba Municipality;

39.1. the 8 Indunas of the areas in which the mine operates

39.2. representatives of local entrepreneurs;

39.3. full-time shop stewards; and

39.4. faith-based organisations.

40. In each of the 8 areas surrounding Somkhele, a democratically elected mining area committee ("**MAC**") has been established to ensure the wider community is represented. The various MACs are consulted through the MCMF, ensuring that the interests of each of these communities are protected.
41. Tendele has developed a roadmap with the input of MCMF representatives which was, subsequently, signed by, *inter alia*, community leaders on 29 March 2017. A copy of the roadmap is attached marked "**TCM2**".
42. The road map outlines the purpose of the MCMF and provides a platform through which, *inter alia* –
- 42.1. community leaders and individuals are consulted in respect of activities undertaken at Somkhele;
 - 42.2. complaints can be raised regarding the activities as Somkhele;
 - 42.3. Social and Labour Plans are developed (to the benefit of the community); and
 - 42.4. compliance with Tendele's black economic empowerment obligations are ensured to the long-lasting benefit of the community.



43. On 21 September 2017, the MCMF addressed a letter to the first applicant (Global Environmental Trust) stating, *inter alia*, that –

43.1. Somkhele has benefited thousands of members of the communities surrounding Somkhele;

43.2. Somkhele has made a material positive contribution to these communities; and

43.3. the MCMF is committed to ensuring the survival of Somkhele.

44. The letter, furthermore, urges the first respondent to stop making false allegations regarding the activities undertaken at Somkhele.

45. A copy of the 21 September 2017 letter is attached marked “TCM3”.

46. The MCMF support is indicative of the support of all of the communities surrounding Somkhele of the continuation of mining operations at Somkhele by Tendele.

The history of mining in the Somkhele area

47. Since the discovery of significant quantities of anthracite in the Somkhele area in the 1880's, the Somkhele mining area has been the subject of numerous prospecting and mining projects.

48. 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.
49. 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 was subsequently mined by Sugar Planters for use in their mechanically stoked boilers.
50. 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.
51. 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.

52. Between 1994 and 2004, AfriOre Ltd ("**AfriOre**") acquired various 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 50 of 1991 ("**Minerals Act**"). In 2004, AfriOre sold its interests in Somkhele to a consortium led by the New Africa Mining Fund ("**NAMF**").
53. In 2005, Petmin Limited, the holding company of Tendele, purchased all of the anthracite interests held by the NAMF in Somkhele.
54. 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.
55. Similarly, Tendele commenced mining operations (comprising drilling activities) in Areas 8 and 9 in July 2007, as described in more detail below.



**Mining rights and approved Environmental Management
Programmes held by Tendele**

56. 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 ("**Tendele Mining Rights**"). These areas are depicted on the attached sketch, marked "**TCM4**", which shows the layout of the Somkhele mine. All five areas fall within Reserve 3 (Somkhele No. 15822) ("**Reserve 3**") in the Magisterial District of Mtubatuba, Kwa-Zulu Natal Province. The mineral in respect of which all the Mining Rights are held, is coal.

57. The Area 1 Mining Right

57.1. On 21 May 2007, Tendele was granted a Mining Right in terms of section 23 of the MPRDA, bearing Department of Mineral Resources' ("**DMR**") reference number: KZN30/5/1/2/2/135MR ("**Area 1 Mining Right**"). A copy of the Area 1 Mining Right is attached as "**TCM5**".

58. The Areas 2 and 3 Converted Mining Right

58.1. 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**

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Mining Right"). A copy of the Areas 2 and 3 Converted Mining Right is attached as "**TCM6**"

- 58.2. 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 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.
- 58.3. On 8 March 2013, the Areas 2 and 3 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 the Areas 2 and 3 Converted Mining Right. A copy of the notarial deed of amendment of the Areas 2 and 3 Converted Mining Right is attached as "**TCM7**".

59. The Areas 4 and 5 Mining Right

59.1. 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**"). A copy of the Areas 4 and 5 Mining Right is attached as "**TCM8**".

59.2. Prior to the grant of the 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 2007 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. To avoid prolixity, I have not attached copies of the Converted Prospecting Right, the Prospecting Permit or the mineral lease and prospecting contract

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to this affidavit. Copies of these documents will be made available to the applicants on request and to the court at the hearing of this matter.

60. An environmental management programme ("**EMP**"), as contemplated in the now repealed section 39 of the MPRDA, has been approved by the DMR in respect of each of the Tendele Mining Rights. By virtue of the transitional provisions contained in NEMA (referred to below), these approved EMP's remain valid and continue to ensure that the environmental impacts of Tendele's mining operations and activities incidental thereto are properly managed.

60.1. 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.

60.2. 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.

60.3. The EMP attaching to the Areas 4 and 5 Mining Right was approved by the Regional Manager on 31 May 2016.

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60.4. To avoid prolixity, only the cover pages of each of these approved EMP's are attached to this affidavit marked "TCM9(a) – (c)". The complete documents will be made available to the applicants on request and to the court at the hearing of this matter.

Tendele's current mining operations

61. 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.
62. 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 Area 1.
63. 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, prior to the registration of the Converted 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 MPRDA in accordance with the Areas 2 and 3 Converted Mining Right and the associated EMP.

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- 64. Mining operations are not being undertaken in and on Area 3.
- 65. Mining operations ceased in Area 2 in January 2012 due to the depletion of the anthracite reserves.
- 66. 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.

THE LAWFULNESS OF TENDELE'S CURRENT MINING OPERATIONS

- 67. As mentioned above, the applicant alleges that Tendele's current mining operations are unlawful because –
 - 67.1. Tendele has no environmental authorisation issued in terms of section 24 of NEMA in respect of the current mining operations;
 - 67.2. Tendele has no land use authority, approval or permission from any municipality having jurisdiction;
 - 67.3. Tendele has no waste management licence issued by the Minister of Environmental Affairs (the fourth respondent) in terms of section 43 of the Waste Act; and because

67.4. Tendele has no written approval in terms of section 35 of the KZN Heritage Act to damage, alter, exhume or remove any traditional graves from their original position.

68. There is no basis for any of these allegations as I will demonstrate below.

No requirement for environmental authorisation for Tendele's current mining operations

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

70. I am advised that Tendele does not require such environmental authorisation for its current mining operations.

71. As mentioned above, Tendele is at present only actively mining in Area 1 and the extended area of Area 2, namely the KwaQubuka (Area 9) and Luhlanga (Area 8) areas. The mine's 3 coal wash plants, which are also presently in operation, are located in Area 2. This is common cause.

72. It is further common cause that the current mining is taking place in accordance with the Area 1 Mining Right and the Areas 2 and 3 Converted Mining Right (as amended) (in respect of Areas 8 and 9 only) and the associated EMP's.

73. To recap:

73.1. The Area 1 Mining Right was granted to Tendele on 21 May 2007 and the Areas 2 and 3 Converted Mining Right was granted to Tendele on 30 March 2011 (following the conversion of an existing Mining Lease) and amended on 8 March 2013.

73.2. The EMP associated with Area 1 was approved by the Regional Manager on 22 June 2007 and the EMP associated with Areas 2 and 3 was approved by the Regional Manager on 30 March 2011 and amended on 29 May 2012.

73.3. Mining operations commenced in Areas 1 and 2 pursuant to the aforementioned Mining Rights and EMP's (or their predecessors) in 2007 but ceased in Area 2 (excluding the KwaQubuka and Luhlanga areas) in 2012.

73.4. Mining operations (comprising drilling activities) were undertaken in the KwaQubuka and Luhlanga areas from July 2007 in accordance with an Old Order Prospecting Right held by Tendele and recommenced in these areas in 2012 and 2017, respectively, in accordance with the Areas 2 and 3 Converted Mining Right.

74. All of this was prior to the implementation of the so-called "One Environmental System" for the mining industry which was implemented by

Government on 8 December 2014 through a raft of legislative amendments, including the amendments to NEMA and the MPRDA referred to by the applicants (namely, the MPRDA Amendment Act 49 of 2008 ("**MPRDA Amendment Act, 2008**"), the National Environmental Management Amendment Act 62 of 2008 ("**NEMA Amendment Act, 2008**") and the National Environmental Management Laws Amendment Act 25 of 2014).

75. At that stage (i.e. prior to the implementation of the One Environmental System) 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 such an approved EMP.
76. Tendele has complied with this requirement and continues to conduct its mining operations in Area 1 and the extended area of Area 2 (being Areas 8 and 9) and the operation of its coal washing plants in Area 2 in accordance with its Mining Rights and approved EMP's.
77. As one would expect, the introduction of the One Environmental System on 8 December 2014 contained certain transitional arrangements.
78. These transitional provisions were contained in both the MPRDA Amendment Act, 2008 and the NEMA Amendment Act, 2008 and

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provided, amongst other things, precisely for the position Tendele found itself in on 8 December 2014.

79. As the applicants correctly point out, the transitional provision in the MPRDA catering for this situation, namely section 32 of the MPRDA Amendment Act, 2008 which sought to include a new section 38B into the MPRDA, has yet to be brought into operation.
80. However, Tendele's position was catered for in section 12 of the NEMA Amendment Act, 2008, subsections (4) and (5) of which provide as follows:

(4) [A]n environmental management plan or programme approved in terms of the Mineral and Petroleum Resources Development Act, 2002 (Act No. 28 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 subsection (4), the Minister of Minerals and Energy may direct any holder or any holder 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, 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.

81. In terms of section 12(4) of the NEMA Amendment Act, 2008, an EMP approved in terms of the MPRDA immediately before the commencement date of the provisions in 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. As mentioned above, the commencement date of these provisions, which marked the commencement of the One Environmental System, was 8 December 2014.

82. In terms of section 12(5) of the NEMA Amendment Act, 2008, if the Minister of Mineral Resources ("**Minister**") is of 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 the holder of the relevant right to take such action to upgrade the EMP to address the deficiencies in the EMP as the Minister may direct in terms of NEMA as amended.
83. Tendele's EMP's in relation to Areas 1, 2 and 3 were approved prior to 8 December 2014. Accordingly, its EMP's must be regarded as having been approved in terms of NEMA as amended by the NEMA Amendment Act, 2008.
84. To date, the Minister has not acted in terms of section 12(5) of the NEMA Amendment Act, 2008 and directed Tendele to upgrade its EMPs to address any deficiencies. This suggests that the Minister is satisfied the Tendele's EMP's adequately address the environmental impacts of Tendele's mining operations at the Somkhele mine.

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85. The conduct of the Minister and the DMR is further supported by the provisions of section 24L(4) of NEMA which provide as follows:

"[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".

86. This section empowers the Minister (who is a competent authority empowered under Chapter 5 of NEMA to issue an environmental authorisation) to regard an approved EMP (being "*an authorisation in terms of any other legislation*") to be an environmental authorisation in terms of NEMA, provided that such EMP meets all of the requirements stipulated in section 24(4)(a) of NEMA and, where applicable, section 24(4)(b) of NEMA.

87. Since the Minister is well aware of Tendele's mining operations (having recently, in 2016 granted a further mining right to Tendele to expand its operations), it is safe to assume that the Minister indeed regards Tendele's EMP's as environmental authorisations in terms of NEMA.

88. What is evident from the discussion above, is that Tendele's current mining operations in Area 1 and the extended area of Area 2 (being Areas 8 and 9) and the operation of its coal washing plants in Area 2 are lawful as they are being undertaken in accordance with lawfully granted Mining Rights and EMP's approved in terms of the MPRDA, which EMP's address

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the environmental impacts of Tendele's mining operations and which EMP's are regarded as having been approved in terms of NEMA.

89. There is accordingly no basis for the applicants' contention that Tendele is mining unlawfully. The contention is thus denied.

Mining is a permissible land use in the Somkhele mine area

90. The applicants allege that Tendele has no land-use authority or approval, permission or the like from any municipality having jurisdiction for the undertaking of mining operations at the Somkhele mine.

91. In particular, the applicants contend that Tendele is undertaking mining operations in contravention of –

91.1. the Kwa-Zulu Natal Planning and Development Act, 6 of 2008 (**"the KZN Planning Act"**), section 38 of which requires municipal approval for the development of land situated outside the area of a land use scheme;

91.2. the Mtubatuba Spatial Planning and Land Use Management By-Law of January 2017 (**"Mtubatuba By-law"**), section 46 of which similarly requires municipal planning approval for the development of land situated outside the area of land use scheme;

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- 91.3. the Spatial Planning and Land Use Management Act 16 of 2013 ("**SPLUMA**"), section 26(3) of which provides that "*[W]here 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*".
92. As the applicants point out (in paragraph 67 of the founding affidavit), both the Hlabisa Local Municipality as well as the Mtubatuba Local Municipality (being the municipalities having historical and current jurisdiction respectively over the Somkhele mine area) have advised that municipal consent was and is not required for the undertaking of mining operations at the Somkhele mine.
93. The advice of both municipalities is correct in this regard as will appear from what is stated below. Even if it is incorrect (which is denied), the advice, in any event, constitutes the required consent for purposes of section 38 of the KZN Planning Act.
94. The KZN Planning Act came into operation on 1 May 2010. For the purposes of section 38 of the KZN Planning Act, "*development*" is defined to mean "*the carrying out of building, construction, engineering, mining or*

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other operations on, under or over any land, and a material change to the existing use of any building or land without subdivision ...”.

95. It is evident from this definition, read together with what I am advised are general principles that apply to the interpretation of statutes (namely that statutes are presumed not to apply with retrospective effect and are presumed not to encroach upon existing right) that a development that does not involve “*a material change to the existing use of any building or land without subdivision*” is not “*development*” for the purposes of the section requiring prior municipal approval.

96. Further in this regard, at the time Tendele commenced its mining operations, land use in what is now the Province of Kwa-Zulu Natal was regulated by the Kwa-Zulu Natal Town Planning Ordinance, 27 of 1949 (“**KZN Town Planning Ordinance**”).

97. At that time (i.e. in 2007 as set out above) section 11(2)(a) of the KZN Town Planning Ordinance provided that -

“[N]o person shall, without the prior authorisation of the responsible Member of the Executive Council, develop within the meaning of this section any land whether inside or outside a municipal area...”.

98. I am advised that this honourable court has previously considered the ambit of this provision in the KZN Town Planning Ordinance and has

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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 for mining specifically), the commencement of such activities did not require municipal consent.

99. Accordingly, since Tendele commenced mining operations at the Somkhele mine in 2007, it did not require municipal consent for its operations at that time.
100. Similarly, municipal consent for the continuation of Tendele's operations was not required when the KZN Planning Act came into operation on 1 May 2010 as Tendele was already mining lawfully at that date.
101. Section 46 of the Mtubatuba By-law read with Schedule 3 of the By-law requires municipal approval for the undertaking of mining operations undertaken outside the area of a land use scheme. A mining operation is defined in Schedule 3 to mean -

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

(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."

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102. It is evident from a reading of this provision that mining operations which commenced prior to 10 October 2008 do not fall within the ambit of "*mining operations*" as contemplated in the By-law.
103. Since Tendele's mining operations (which include processing as defined in the MPRDA) commenced in 2007 and thus prior to the date contemplated in the above provision, its operations do not constitute "mining operations" for the purposes of section 46 of the Mtubatuba By-law for which municipal consent is required.
104. Turning finally to the provisions of SPLUMA, section 26(3) provides that where no town planning or land use scheme applies to a piece of land (which is the case of the Somkhele mining area), such land may only be used for the purposes listed in schedule 2 SPLUMA (which includes mining) and for which such land was lawfully used or could lawfully have been used immediately before the commencement of SPLUMA. SPLUMA commenced on 1 July 2015.
105. Tendele was using the land comprising the Somkhele mine lawfully on 1 July 2015 as no municipal consent was required for the commencement and continuation of mining operations for the reasons mentioned above and the mining was being undertaken, as at 1 July 2015, pursuant to valid Mining Rights and approved EMPs in terms of the MPRDA. Accordingly, the continuation of mining operations is in accordance with the provisions of SPLUMA.

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106. In June 2015, the Mtubatuba Municipality published the Mtubatuba Spatial Development Framework for the Mtubatuba Municipal area ("**Mtubatuba SDF**"). The Mtubatuba SDF serves as a principal strategic spatial planning instrument, which guides and informs all planning, land management, development and spatial decision-making by the Mtubatuba Municipality. It is a component of the Mtubatuba Integrated Development Plan ("**Mtubatuba IDP**") and aims to create a spatial interpretation of the strategies and projects already contained in the Mtubatuba IDP.
107. The Mtubatuba SDF states that "*[W]hile Somkhele generally emerged as a settlement area, this has changed with the development of the coal mining operations, which now acts as an important economic base for the area.*"
108. At 5.4.6 of the Mtubatuba SDF, a summary of the historic as well as current mining operations at Somkhele is provided. At page 105 of the Mtubatuba SDF it is stated that –
- "[the] Somkhele Node will serve as a nucleus around which dense rural settlement will occur. The node will be developed with public facilities and commercial activities that supports (sic) this ideal while also improving the quality of life and access to such services for the rural poor. Somkhele Mine and Africa Centre serves (sic) as a catalyst in this regard."*
109. In addition, the Mtubatuba SDF provides, at page 107, that "*[A]long this corridor [being the Somkhele node] a mixed use type of development is envisaged and this include (sic) primary health care facilities, educational*

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facilities, mini-shopping centre, mining, residential library, main taxi rank including informal trading facilities, office park, industrial, SMME centre and government offices. Somkhele is an incipient node located along R618 and has a huge development potential."

110. The Mtubatuba Municipality clearly recognises the importance of Somkhele mine as a "catalyst" for further development in future (inclusive of mining) and the improvement of the quality of life for people residing in this area. Tendele is, therefore, undertaking mining operations at Somkhele as contemplated in the IDP as well as in the Mtubatuba SDF. The Mtubatuba Municipality is obliged to take into account the content of the Mtubatuba SDF as well as the projects envisaged by the Mtubatuba IDP when taking any land use planning decision, inclusive of the importance of Somkhele mine as both an employer and as a "catalyst" for development.

111. From the above analysis, it is evident that the applicants' complaints regarding Tendele not having the requisite land use authorisation from the relevant municipalities are ill-founded and baseless. Tendele's operations are taking place in accordance with all applicable land use planning tools (being the Mtubatuba IDP and Mtubatuba SDF) and legislation.

No waste management licence is required

112. The applicants contend that Tendele's operations are unlawful as Tendele does not have a waste management licence for its activities as required by the Waste Act.
113. In terms of section 20 of the Waste Act, no person may commence, undertake or conduct a listed waste management activity unless a waste management licence is issued in respect of that activity.
114. A list of waste management activities for which a waste management licence is required was first published under section 19 of the Waste Act on 3 July 2009. This list was subsequently repealed and replaced with a further list on 29 November 2013 ("**2013 Listing Notice**") which list was then amended by the addition of new waste management activities by notice dated 24 July 2015.
115. To the extent that Tendele is undertaking a waste management activity (which is denied), I am advised that the continuation of such activities would in any event not require a waste management licence by virtue of the transitional provisions attached to the 2013 Listing Notice (as amended).
116. In particular 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 a person to apply for a waste management licence”.

117. Accordingly, a person who was lawfully conducting a listed waste management activity on 29 November 2013 (being the date the 2013 Listing Notice came into effect) or on 24 July 2015 when the 2013 Listing 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 a licence.
118. Tendele's mining operations at the Somkhele Mine are lawfully undertaken in accordance with its Mining Rights and approved EMP's as mentioned above. The Minister of Environmental Affairs has not 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).
119. Accordingly, no waste management licence is required for the continuation of Tendele's operations at the Somkhele Mine and there is no basis for the applicants' allegations to the contrary.

Relocation of graves

120. The applicants allege that Tendele has damaged, altered, exhumed and removed traditional graves from their original position without the necessary written approval in terms of section 35 of the KZN Heritage Act.

121. Before I explain what Tendele has done in relation to traditional graves, I point out that even on the applicants' version their complaints about the alleged unauthorised removal of traditional graves could not conceivably entitle them to an interdict that would shut down Tendele's entire mining operation. At best, it could only entitle them to relief sufficient to protect the particular graves that they allege are being unlawfully damaged or altered. However, for the reasons that follow, the applicants have not made out a proper case even for such narrower relief.
122. At the outset, I accept that Tendele has previously removed or altered traditional graves without being in possession of the necessary authorisations from the Amafa aKwazulu-Natali Heritage Council ("**Amafa**"). All relocations of traditional graves that have taken place have nevertheless occurred in consultation with the affected families and communities. More recently, Tendele 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.
123. The process that Tendele has followed in relation to the graves is the following:
- 123.1. In August 2001, Tendele commissioned a consultant (Groundwater Consulting Services or GCS) to compile the archaeological component of a heritage impact assessment of the Somkhele mine. Tendele was advised that the issue of grave



relocation did not form part of the archaeological component and therefore needed to be done separately from the heritage impact assessment.

123.2. On 10 November 2003, the Department of Traditional and Local Government Affairs in the KwaZulu-Natal Provincial Government granted Tendele approval to exhume and relocate certain human remains. A copy of the approval is attached marked **"TCM10"**.

123.3. In December 2007, GCS compiled a socio-economic impact assessment of the Somkhele mine. The assessment dealt with the question of the graves and emphasised that it would be necessary for Tendele to consult with the affected persons regarding the relocation of the graves. However, the assessment did not inform Tendele of the need to obtain permits from Amafa to relocate the graves. A copy of the cover page and pages 21 to 22 of the assessment which deals with grave sites is attached marked **"TCM11"**.

123.4. Following the advice of its consultants, Tendele then undertook an intensive consultation process with families and individual homesteads which culminated in written agreements between the mine and the affected families regarding the relocation of the graves. An example of such an agreement is attached marked **"TCM12"**.

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- 123.5. It is evident from these agreements that, at that stage, Tendele did not appreciate the full extent of the process that the mine was required to follow in order to relocate traditional graves.
- 123.6. On 30 April 2017, Amafa wrote to Tendele notifying Tendele that it had received a formal complaint relating to Tendele's activities and its impact on heritage resources. A copy of this letter is attached marked "**TCM13**".
- 123.7. On 8 May 2017, Tendele held a meeting with Amafa. At the meeting Tendele provided Amafa with the abovementioned reports and agreements concluded with affected families and discussed the process it had followed in the past in regard to the relocation of traditional graves. Amafa outlined the future requirements for Tendele in respect of future relocations and Tendele undertook that going forward no graves would be exhumed or relocated until it had obtained the necessary permits from Amafa. It was agreed that Amafa and Tendele would meet quarterly to liaise on heritage management issues. A copy of the minutes of this meeting is attached marked "**TCM14**".
- 123.8. On 26 May 2017, Tendele sent a follow-up letter to Amafa recording the status of current grave relocations and the steps that were being taken in order to manage the process as well as



setting out the proposed process in respect of future grave relocations. A copy of this letter is attached marked "TCM15".

123.9. On 30 May 2017, Tendele wrote to the Principal Inspector of Mines at the DMR. The letter informed the DMR of Tendele's meeting with Amafa of 8 May 2017. It records that it had come to Tendele's attention that mining had occurred within 100 metres of a burial sites. As soon as this was realised the mine halted its mining operations and put up a precautionary safety barrier around each burial site. Tendele acknowledged the requirement that no exhumation or relocation could commence without the permit being issued by Amafa and the correct process was being followed. It also undertook *"that no mining will continue closer than 100m of the areas, as indicated in yellow circles, on the attached aerial photograph and will only continue once due process has been concluded regarding the heritage management plan, permitting from Amafa and COGTA as well as finalised exhumation and relocation of the graves"*. A copy of this letter is attached marked "TCM16". Representatives of Amafa visited the burial sites in question (which were cordoned off with a safety barrier) in June 2017 and inspected the notices for the graves and acknowledged that the precautions taken by Tendele were satisfactory.

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123.10. On 19 June 2017, the first of the quarterly meetings between Amafa and Tendele was held in which the exhumation and relocation procedures as well as heritage surveys and heritage management plans were discussed. Amafa recorded that it had received various questions and concerns raised by interested and affected parties. Amafa stated that it did not intend to *"prosecute the mine for historical things and the mine's focal point going forward should be intensive consultations with the families and individual homesteads"*. A copy of the minutes of this meeting is attached marked **"TCM17"**.

123.11. On 22 June 2017 Tendele wrote to Amafa. Tendele again emphasised that it was committed to comply with the legislation and requested *"guidance from Amafa regarding correcting the errors of the past so we can move forward in a constructive and fruitful manner, within the guideline of the necessary legal framework"*. A copy of the letter is attached marked **"TCM18"**.

123.12. On 26 July 2017, the Department of Cooperative Governance and Traditional Affairs wrote to Tendele informing it that the MEC had granted approval to exhume three graves for the purposes of mining and to relocate those graves. A copy of this approval is attached marked **"TCM19"**.

123.13. On 11 August 2017, Amafa issued a permit granting Tendele consent to relocate a further three graves. A copy of this permit is attached marked "**TCM20**".

123.14. On 19 September 2017, Amafa and Tendele held the second official quarterly meeting concerning heritage issues. A copy of the minutes of this meeting is attached marked "**TCM21**".

124. It is evident from the above that:

124.1. Although Tendele has, in the past, conducted relocations of traditional graves without the necessary authorisations from Amafa, as soon as it realised its omission in this regard it engaged with Amafa about how to remedy the omission going forward.

124.2. Tendele has always taken its obligation to safeguard traditional grave sites seriously and has engaged extensively with the affected families in regard to the relocation of any graves. Its previous omission to obtain authorisations was due to *bona fide* oversight on its behalf.

124.3. There is no reasonable apprehension that Tendele will in future alter, relocate, damage or exhume any traditional grave without the necessary authorisation 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.

125. I am advised and accordingly submit that the applicants' 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.

REQUIREMENTS FOR FINAL INTERDICT NOT SATISFIED

126. I am advised that to obtain a final interdict, an applicant is required to demonstrate a clear right, an injury actually committed or reasonably apprehended and the absence of similar protection by any ordinary remedy. Even if the version of the facts and the law set out in the founding affidavit were correct (which is denied) the applicants have failed to satisfy these requirements.

127. First, the applicants have not demonstrated that they have a clear right to the relief that they seek.

127.1. The applicants complain that Tendele is mining without various statutory authorisations required for its operations. For the reasons set out above, I deny that this is so.



- 127.2. But even if it were correct, the applicants have failed to demonstrate that Tendele's conduct breaches any rights of the applicants.
- 127.3. There is no general entitlement to interdict unlawful conduct. The applicant for an interdict must demonstrate that the unlawful conduct in question infringes one of his or her rights.
- 127.4. Even on their own version (which is denied), the applicants have failed to put up any evidence that Tendele's mining at the Somkhele Mine without necessary environmental authorisation, land use authority or waste management licence (which approvals Tendele denies are required to be held by Tendele for the reasons outlined above) violates any right which vests in the applicants.
- 127.5. The various statutes on which the applicants rely create regulatory authorities who are empowered to enforce compliance with the statutes they administer. Even if Tendele was mining without the requisite authorisations, the right to prevent it from doing so would lie with those regulatory authorities (which is denied), not with the applicants.
128. Second, the applicants do not contend that they have no adequate alternative remedy. The statutes on which the applicants rely provide for a

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range of adequate alternative remedies available to address the applicants' concerns.

128.1. The applicants complain that Tendele has no environmental authorisation in terms of section 24 of NEMA to conduct mining operations at the Somkhele mine. They also complain that Tendele has no waste management licence for its activities as required by the Waste Act.

128.2. But NEMA itself provides for a range of remedies for such complaints.

128.2.1. Section 28(4) of NEMA gives the Director General of the Department of Environmental Affairs, the Director General of the Department of Mineral Resources, and a provincial head of department the power to, inter alia, direct a person causing significant pollution or degradation of the environment to cease the offending activity.

128.2.2. If a person fails to comply with such a directive, the Director General or provincial head of department may apply to a competent court for appropriate relief (section 28(7)).



128.2.3. Section 28(12) provides that any person may, after giving notice, apply to a competent court for an order directing the Director Generals or provincial heads of department to take any of the steps listed in section 28(4).

128.2.4. There is no evidence that the applicants have sought to make use of these remedies or to engage with any of the responsible officials about these remedies.

128.3. The applicants complain that Tendele has never obtained municipal permission to conduct mining or to use the land for mining purposes.

128.3.1. The KZN Planning Act provides that developing land contrary to a land use scheme or without prior approval is an offence (section 75).

128.3.2. The remedy for the commission of such an offence is the service by the municipality of a contravention notice (section 80). The municipality is required to serve such a notice if it has reasonable grounds to suspect that a person is guilty of such an offence.

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128.3.3. If the contravention notice does not result in compliance, the municipality is required to serve a prohibition order, or approach the High Court for an order restraining the illegal activity (section 81(2)).

128.3.4. The applicants have not attempted to compel the relevant municipalities to invoke these provisions.

128.4. The applicants complain that Tendele has no written approval from Amafa in terms of section 35 of the KZN Heritage Act to damage, alter, exhume or remove any traditional graves from their original position.

128.4.1. Amafa is empowered to identify, conserve and protect the heritage resources of the province (section 6).

128.4.2. Amafa is empowered to do everything necessary or expedient in pursuit of this object (section 8(2)(h)).

128.4.3. Amafa is required to provide for and facilitate community and stakeholder involvement in heritage matters (section 7(b)(iii)).



128.4.4. Amafa is the body responsible for issuing approvals in terms of section 35 relating to the alteration, exhumation or removal of traditional graves.

128.4.5. There is no evidence that the applicants have engaged with Amafa about their remedies relating to the traditional graves.

128.5. In addition, I am advised that the applicants' complaints about traditional graves do not justify the grant of an interdict which would have the effect of closing Tendele's entire mining operation.

128.6. An interdict is available only in respect of an ongoing wrong or future unlawful conduct. As explained above, Tendele is now working closely with Amafa and the affected families to ensure that any relocation of traditional graves occurs in consultation with Amafa and the community and is in accordance with the law.

128.7. The applicants' complaints regarding the traditional graves therefore relates only to Tendele's historical conduct in relation to the graves. But an interdict is not an appropriate remedy for past conduct.

128.8. Moreover, the interdict that the applicants seek goes beyond what is required to prevent the wrong they complain of. They seek an



interdict that would stop Tendele from conducting any mining operations at Somkhele. Even if the applicants had made out a case that Tendele is committing and on-going or future wrong in respect of the graves (which they have not), they would only be entitled to an interdict to the extent necessary to bring an end to the unlawful conduct, i.e., to protect the traditional graves in issue. They would not be entitled to an interdict against all mining operations at Somkhele.

129. Finally, the applicants do not set out with sufficient particularity the injury they say they are suffering because of Tendele's mining operation.

129.1. The applicants assert at the most general level that the mine is damaging the environment.

129.2. These allegations are pleaded without any substantiating evidence. As a result, it is impossible for Tendele to answer properly to it.

129.3. The defects in the way that the applicants have pleaded their allegations of harm preclude this Court from properly assessing the nature and extent of the alleged environmental harm, if any, caused by the mine.

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129.4. The remainder of the harm relied on by the applicants, such as the alleged loss of a small number of farm animals, is insufficient to establish an entitlement that the mining operation cease in *toto*.

129.5. In addition, the applicants have failed to address the benefits that the mine brings to the area, which I set out elsewhere in this affidavit.

The harm that would be caused if an interdict is granted

130. The applicants seek to interdict all mining operations at Somkhele. In doing so, they have relied on non-specific and generalised allegations of harm that they are allegedly suffering because of the mining. I am advised that this Court will also consider the harm that would be caused to the broader community if the interdict were granted.

131. In order to explain that harm, I refer to what I set out earlier under the "Factual Background" section of this affidavit. In this regard, I highlight the following benefits of the Somkhele mine that would be lost if an interdict preventing the mine from operating is granted:

131.1. Tendele is the principal supplier of anthracite to ferrochrome producers in South Africa. Should its operations be interdicted, local ferrochrome producers would be required to import its reductants in order to continue production which would

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significantly increase the cost of the production of ferrochrome. Increased production costs may result in retrenchments which will negatively affect South Africa's trade balance and have associated regional and national economic impacts.

131.2. As the major employer in the Somkhele area, an interdict preventing Tendele from continuing to mine would have devastating impacts on employment and thus on poverty in the area. The shutting down of Tendele's operations would also result in the loss of the services provided by Tendele such as the education and training programmes it funds, the infrastructure it has provided and continues to provide and the services it continues to procure from community based black economic empowerment companies. It would also result in the loss of the 20% stake Tendele has given communities surrounding Somkhele.

131.3. This must be weighed up against the harm that would allegedly be suffered by the applicants if mining continued. As stated above, the applicants assert at the most general level that the mine is damaging the environment. Very little evidence is presented to substantiate this allegation.

131.4. In support of the benefits of the mine to the local economy, I attach letters ("**marked TCM22 (a) – (c)**").

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131.4.1. from Mayor Mkhwanazi to the Human Rights Commission dated 7 October 2016, in which the Mayor states that the mine "*has made a tremendous long-lasting impact in the area*";

131.4.2. from the National Union of Mineworkers, the Association of Mineworkers and Construction Union and Solidarity to the Human Rights Commission dated 7 October 2016, in which letter these unions emphasise, *inter alia*, the importance of the continuation of mining at Somkhele for their members and members' families; and

131.4.3. from the MCMF, in which letter the MCMF indicate their unconditional support of Tendele opposing this Court Application.

132. The reality is that the cessation of mining operations at Somkhele would render some 1 000 local people unemployed and would be the death-knell of the Mtubatuba economy.

133. This makes it all the more unacceptable that the applicants have taken it on themselves to attempt to bring an end to all mining operations at Somkhele, in circumstances where the facts clearly indicate that the applicants do not represent the broader community and where they do not

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even suggest that they have any mandate to represent the broader community.

AD SERIATIM

134. I will now deal with the specific allegations made in Dladla's founding affidavit. Since I have already addressed many of the allegation contained in the founding affidavit, I will not respond to each and every allegation made. To the extent that I may fail to deal with any specific allegation, this is not to be taken as an admission. Any allegation made in Dladla's affidavit which is not in accordance with Tendele's version as set out above, must be taken to be denied.

135. Ad paragraph 17

Save to state that Tendele has been conducting open cast mining operations for anthracite since 2006 as mentioned above and that the Somkhele mine is situated on Ingonyama Trust Land which is administered by the Ingonyama Trust and is referred to as Reserve 3 (Somkhele No. 15822), the allegations in this paragraph are denied.

136. Ad paragraph 18

Save to stated that I am advised that the appeal being referred to is the Areas 4 and 5 Mining Right and Tendele has not commenced mining in and on Areas 4 and 5, the content of this paragraph is denied.

137. Ad paragraph 19

The applicants say that Tendele is non-compliant in respect of the permits or approvals it requires to conduct its mining operations. This is incorrect. For the reasons set out above, Tendele either does not require the permits or approvals the applicants refer to, or is in possession of all of the necessary permits or approvals.

138. Ad paragraph 22

The applicants purport to bring their application in the public interest and in the interests of all of the groups of persons living in the area of the Somkhele mine. For the reasons I have already given, the application manifestly does not serve the interests of the majority of community members living in the proximity of the mine. On the contrary, an interdict which would have the effect of causing Tendele to cease its mining operations would have catastrophic effects for the local economy and the communities that the applicants purport to represent. I also note that the applicants put up no evidence of any mandate from the broader community to bring this application. Furthermore, and as outlined above, the MCMF, which represents the interests of the communities surrounding

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Somkhele mine, strongly support Tende's opposition to this court application.

139. Ad paragraphs 25 and 26

I deny that the second applicant (the Association) or the deponent are acting in the interests of all the people residing in the vicinity of the mine.

140. Ad paragraph 28

The deponent asserts that much of the information contained in the main founding affidavit was observed by Youens. He does not explain which paragraphs of his affidavits are confirmed by Youens. Nor does Youens' confirmatory affidavit specify which particular paragraphs or facts she has observed or confirms. It is accordingly impossible to determine which of the allegations in the founding affidavit are confirmed by Youens. Her evidence can accordingly carry no weight in these proceedings.

141. Ad paragraphs 36 - 54

141.1. The bulk of these paragraphs amounts to a summary of applicable legislation and legal argument. To the extent that the applicants' understanding of the effect of the various statutes differs from that set out in the rest of this affidavit, the contents of these paragraphs

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are denied. Full legal argument on these issues will be advanced at the hearing of the matter.

141.2. I must however, highlight two patent errors in the applicants' summary:

141.2.1. The first appears at paragraph 36. It is stated that an environmental authorisation in terms of NEMA must be procured by making an application in terms of section 24 of NEMA which is adjudicated by the Minister of Environmental Affairs. This is incorrect. Applications for environmental authorisation for mining operations or activities directly related thereto are adjudicated by the Minister of Mineral Resources and not the Minister of Environmental Affairs.

141.2.2. The second error appears at paragraph 37. Under the Environment Conservation Act 73 of 1989 (which preceded the introduction of the One Environmental System mentioned above), environmental authorisation under any environmental legislation was not required for mining operations or activities directly related thereto.

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142. Ad paragraphs 61 - 63

The contents of these paragraphs are legal argument that will be dealt with at the appropriate time.

143. Ad paragraphs 67 and 68

The applicants contend that Tendele has no land use or town planning permission in respect of its mining activities. This allegation is denied. The relevant legislation provides for the continuation of historical mining operations such as those undertaken by Tendele. The advice provided to Youens by both municipalities to the effect that Tendele does not require planning approval or land use approval for its mining operations (which advice is correct) is specifically noted.

144. Ad paragraphs 71 – 85

The bulk of these paragraphs amounts to a summary of applicable legislation and legal argument. To the extent that the applicants' understanding of the effect of the various statutes and By-laws differs from that set out in the rest of this affidavit, the contents of these paragraphs are denied. Full legal argument on these issues will be advanced at the hearing of the matter.

145. Ad paragraphs 91 – 95



These paragraphs contain a summary of certain applicable legislation and legal argument. To the extent that the applicants' understanding of the effect of the various statutes and By-laws differs from that set out in the rest of this affidavit, the contents of these paragraphs are denied. Full legal argument on these issues will be advanced at the hearing of the matter.

146. Ad paragraphs 97 - 99

The applicants point to what they allege is irreparable harm being suffered by residents in the area of Reserve 3. These allegations are pleaded at the most general level and without any substantiation. Moreover, the applicants fail to take into account the harm that will be caused by the grant of the interdict that they seek.

147. Ad paragraph 100

The deponent attaches three photographs to the affidavit. Those photographs do not support the application in any way or demonstrate that anyone is suffering irreparable harm as a result of the mining operations.

148. Ad paragraphs 105 - 109

148.1. The applicants refer to cattle having been lost due to their wandering into the mining area. They have not attached the

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photographs referred to in paragraph 109. Nor have they attached the letter of complaint that they refer to in paragraph 109.

148.2. I have no knowledge of the contents of these allegations. However, even if they are correct (which is denied), I deny that they would entitle the applicants to an interdict against Tendele's entire mining operation.

149. Ad paragraphs 112 - 113

149.1. The applicants claim that the quality of water available from the Mfolozi River has been negatively affected by the mine and that the mine has used water from boreholes leaving nothing for the local communities.

149.2. I deny the contents of these paragraphs. The Greater Somkhele region has been experiencing drought conditions. Tendele has undertaken a number of drought relief initiatives including:

149.2.1. fixing the municipality pump station and providing tap water for surrounding communities;

149.2.2. supplying JoJo tanks that were given to the municipality to fill with water;

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149.2.3. the repair of six hand pumps, clearing three dams, and creating water points to provide communities with water;

149.2.4. the drilling of a new borehole with a hose connection for community use;

149.2.5. the establishment of water collection points along the R618 road; and

149.2.6. bringing in 10 - 12 water tankers (being 12 000l per load) per week from Empangeni amounting to 120 000l – 144 000l per week for use by the community.

150. Ad paragraph 113

Attached marked "**TCM23**" is a test report dated 22 February 2017 of a sample taken from a monitoring point in the Nkolokotho stream which demonstrates that the water quality of the stream is within prescribed parameters.

151. Ad paragraph 114

The applicants complain that Tendele conducts blasting activities without sounding an alarm to warn the community and complains about the effect

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of blasting. Tendele has adopted an operational procedure to minimise the risk of accidents or incidents associated with blasting and handling of explosives in the mine. A copy of this operational procedure is attached marked "TCM24".


152. Ad paragraph 115

152.1. The deponent says that in 2010 his house developed cracks around doorframes and in the walls due to blasting activities.

152.2. The mine does not take allegations of damage to members of the local community's property as a result of its activities lightly. It has recently commissioned a report about the effects of such blasting. I attach a copy of the report excluding annexures marked "TCM25". The report notes that although existing cracks in the sample houses could have developed as a result of other causes, it may have been caused by blasting. Lack of historical records make it impossible to determine whether this is the case. The report goes on to conclude that regular inspections should be performed over an extended period.

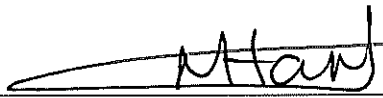
Wherefore, I respectfully state that the applicants have failed to make a case for the relief sought and I accordingly pray for an order dismissing the application with costs such cost to include the costs of two counsel.

A handwritten signature in black ink, appearing to be 'G M' or similar, located in the bottom right corner of the page.



DEPONENT

I hereby certify that the deponent declares 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 24th day of **NOVEMBER 2017** and the Regulations contained in Government Notice R1258 of 21 July 1972, as amended, have been complied with.



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