IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL DIVISION, PIETERMARITZBURG

CASE NO. 11488/17P

The Centre for Environmental Rights — Applicant for admission as an amicus curiae

In the matter between:

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

In re: the Application by the Centre for Environmental Rights to be admitted as *Amicus Curiae*

APPLICATION TO BE ADMITTED AS AN AMICUS CURIAE IN TERMS OF RULE 16A(5) OF THE UNIFORM RULES OF COURT

KINDLY TAKE NOTICE THAT the Centre for Environmental Rights intends to make application, at the hearing of the application for leave to appeal to be heard on a time and date to be arranged with the Registrar of the above Honourable Court, for an order in the following terms:

1. That the applicant for admission as an amicus curiae is admitted as *amicus curiae* in the application for leave to appeal in the above matter;

2. That the applicant for admission as an amicus curiae is granted leave to present oral submissions at the hearing of the application for leave to appeal;

3. That condonation is granted for the late filing of this application and for truncating the time periods prescribed in Rule 16A(2), to the extent that it may be necessary.

4. That any party who opposes the application shall pay the costs of this application;

5. Further and/ or alternative relief.

THAT NOTICE FURTHER THAT the affidavit of **CATHERINE HORSFIELD** will be used in support of this application.

TAKE NOTICE FURTHER THAT the applicant for admission as an amicus curiae has appointed its own office C/O AUSTEN SMITH ATTORNEYS set out hereunder, as the address at which they will accept notice and service of all documents and processes in these proceedings.

KINDLY TAKE NOTICE FURTHER THAT if any party intends opposing this application it is required to file an answering affidavit on or before 27 February 2019.

DATED at PIETERMARITZBURG on this the 19th day of FEBRUARY 2019.

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TO: **THE REGISTRAR OF THE HIGH COURT PIETERMARTIZBURG**

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"WITHOUT PREJUDICE"
RECEIVED A COPY HEREOF ON THIS 19 DAY
OF February 2019 AT 15 H 09
SIGNED: pp HAY & SCOTT ATTORNEYS

AND TO: **MALAN SCHOLES INC.**
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DATE: 19 . 02 . 2019
TIME: 15:00
Shepstone Wylie ATTORNEYS

AND TO: **TOMILSON MNGUNI JAMES INC.**
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IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL DIVISION, PIETERMARITZBURG

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HLABISA MUNICIPALITY	Sixth Respondent
INGONYAMA TRUST	Seventh Respondent
EZEMVELO KZN WILDLIFE	Eighth Respondent
AMAFA AKWAZULU-NATAL HERITAGE COUNCIL	Ninth Respondent

In re: the Application by the Centre for Environmental Rights to be admitted as *Amicus Curiae* *in the application for leave to appeal*

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FOUNDING AFFIDAVIT IN

APPLICATION FOR ADMISSION AS *AMICUS CURIAE* IN TERMS OF RULE 16A

(IN THE APPLICATION FOR LEAVE TO APPEAL

TO THE SUPREME COURT OF APPEAL)

I the undersigned,

CATHERINE HORSFIELD

do hereby make oath and say that:

1. I am an attorney of the High Court of South Africa, employed as such by the Centre for Environmental Rights ("the CER"), where I head the Mining Programme.

2. I am duly authorised to bring this application on behalf of the CER.

3. The facts contained in this affidavit are within my own personal knowledge and belief, save where the contents indicate otherwise, and they are true and correct.

INTRODUCTION AND PURPOSE OF THE APPLICATION

4. In this application, the CER seeks admission as *amicus curiae* in the application for leave to appeal to the Supreme Court of Appeal ("SCA"). The CER intends in due course to make application in terms of SCA Rule 16, which deals with *amicus curiae* submissions, so that it may make submissions at any subsequent appeal to the SCA, should this Court be inclined to grant leave to that Court.

5. The purpose of this application for intervention is to involve the CER before the appeal stage in order to support the application for leave to appeal.

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6. The present application is brought in terms of Rule 16A (submissions by an *amicus curiae*). In this affidavit, I set out:

6.1. the interest and *locus standi* of the CER to intervene at the leave to appeal stage;

6.2. the judgment of the court *a quo*;

6.3. compliance with Rule 16A of the Uniform Rules of Court (and condonation for any non-compliance with Rule 16A, in so far as it may be necessary);

6.4. the legal submissions that the CER intends to advance at the leave to appeal hearing (if admission is granted).

THE INTEREST AND *LOCUS STANDI* OF THE CER

7. The CER is a registered non-profit company with registration number 2009/020736/08 that has been accredited as a non-profit organisation by the Department of Social Development under the Non-profit Organisations Act, 1997 with reference number NPO No. 075-863.

8. The CER is also a law clinic accredited by the Law Society of the Cape of Good Hope, and operates principally from premises at Springtime Studios, 1 Scott Road, Observatory, Cape Town, Western Cape.

9. The CER's mission is to advance the constitutional right – contained in section 24 of the Constitution – enjoyed by "everyone" – to an environment not harmful to health or well-being.

JLT

10. The CER helps communities and civil society organisations in South Africa realise that right by advocating and litigating for environmental justice and on issues pertaining to environmental justice. One way in which it does so is by seeking to promote compliance, transparency and accountability with environmental laws and licences in South Africa.

11. The CER has standing in the present application to act in the public interest in terms of section 38(d) and (e) of the Constitution of the Republic of South Africa, 1996.

12. The CER is also empowered to act in terms of section 32 of NEMA, which – like section 38 of the Constitution, 1996 - contains broad *locus standi* provisions. Section 32 of NEMA, titled "Legal standing to enforce environmental laws" provides that "*[a]ny person or group of persons may seek appropriate relief in respect of any breach or threatened breach of any provision of this Act, including a principle contained in Chapter 1, or of any provision of a specific environmental management Act, or of any other statutory provision concerned with the protection of the environment or the use of natural resources*":

12.1. in that person's or group of person's own interest;

12.2. in the interest of, or on behalf of, a person who is, for practical reasons, unable to institute such proceedings;

12.3. in the interest of or on behalf of a group or class of persons whose interests are affected; in the public interest; and

12.4. in the interest of protecting the environment.

13. Both section 38 of the Constitution and section 32 of NEMA have been drafted as broadly as possible to permit applicants (such as the CER) to litigate in the public interest and in other matters on behalf of those who are unable to do so in their own name.

14. Mining has significant environmental impacts, affecting air quality, water and soil, disproportionately impacting already vulnerable, often poor communities in South Africa. The CER's mining programme seeks to promote transparency, public participation, accountability and compliance with environmental laws and licences in the mining sector. A core objective of the mining programme is to ensure that constitutionally guaranteed environmental rights, of mining-affected communities in particular, are not violated.

15. The CER has steadily built a reputation as a key player and expert in the battle for improved environmental regulation of mining in South Africa. The CER has engaged with the range of competent authorities charged with the various aspects of environmental governance of mining and made detailed submissions to those departments on the legislative framework, under review since 2008.

16. The CER also made detailed written and oral submissions to the various parliamentary portfolio committees charged with law-making on environmental governance of mining and was invited to address the portfolio committees on mineral resources and environmental affairs on legislative and implementation challenges occurring at this intersection. As I will show, the regulatory landscape prior to the introduction of the one environmental system ("OES") - and the transition arrangements pursuant to the

OES - are key issues in the leave to appeal application – and key issues on which the CER wishes to make submissions (if leave to appeal is granted).

17. The CER has litigated, both in its own name and as attorneys of record on behalf of civil society, on various aspects of environmental laws and the interpretation of section 24 of the Constitution, 1996, and other related constitutional rights. Through its case work and advocacy, the CER has acquired considerable expertise in the intersection of mining and environmental law which informs the submissions it wishes to advance.

18. The CER was not a party to the proceedings in the Court a *quo* which led to the judgment against which the applicants seeks leave to appeal. Nor was it involved as an *amicus curiae* at that stage. The applicants in the proceedings have, however, sought leave to appeal against the decision of the Court a *quo* – and it is these proceedings in which the CER wishes to now be involved on behalf of the public.

19. In *Campus Law Clinic, University of Kwa-Zulu Natal v Standard Bank of South Africa Ltd* 2006 (6) SA 103 (CC), the Constitutional Court held that granting an *amicus* standing depends on various factors.

20. Included in those factors are:

20.1. the nature of the relief sought and the extent to which it is of general and prospective application;

20.2. the range of persons or groups who may be directly or indirectly affected by any order made by the Court and the opportunity that those persons or groups have had to present evidence and argument to the Court;

20.3. the degree of vulnerability of the people affected; the nature of the rights said to be infringed;

20.4. the consequences of the infringement.

21. I submit that environmental matters such as the present meet all of the above requirements: the CER acts in the interests of those without resources and means to litigate in their own names, and are people who are typically marginalised and disproportionately affected by environmental degradation (and specifically mine-related environmental harm).

22. In this matter, the Global Environmental Trust, Mfolozi Community Environmental Justice Organisation and Mr Sabelo Dladla (the applicants) applied to Court for an interdict restraining Tendele Coal Mining (Pty) Ltd (the first respondent) from continuing coal mining operations on certain properties situated near the border of the Hluhluwe-Imfolozi Nature Reserve in KwaZulu-Natal Province.

23. The applicants alleged that the first respondent's operations were illegal for *inter alia* failure to obtain environmental authorisation in terms of the National Environmental Management Act, 1998 ("NEMA") for conducting listed activities on the site.

24. The application was dismissed and the applicants lodged an application for leave to appeal on 11 December 2018.

THE JUDGMENT OF THE COURT *A QUO*

25. The judgment handed down in this matter on 20 October 2018 – which is the subject of the application for leave to appeal - raises important issues around the interpretation of a suite of environmental and mining laws and their interplay. It is therefore a case of

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considerable importance and jurisprudential value. The *ratio* and *dicta* of the Honourable judge *a quo* will undoubtedly be cited and relied on in other divisions around the country in similar matters.

26. The interpretation of the issues raised in the application, as well as their application to the facts, would benefit from clarification on appeal, particularly to ensure that the interpretation of the laws adopted by this Court is not read in a manner so as to undermine the environmental right entrenched in the Constitution, 1996.

27. As demonstrated above, the CER is uniquely positioned to make submissions in the issues raised in this complex matter.

28. In particular, the CER wishes to make submissions regarding the legislative framework, including the development of environmental and mining laws over time, and to set out the implications of this evolving framework. In so doing, the CER will seek to demonstrate how the judgment of the court *a quo* may invite broader – and potentially not considered – negative implications or interpretations. It may open the door to companies disregarding environmental safeguards.

29. For this reason, the CER seeks leave to intervene. The precise nature of the submissions the CER wishes to advance will be set out in greater detail below.

CONDUCT OF THE CER IN COMPLYING WITH RULE 16A OF THE UNIFORM RULES OF COURT (AND CONDONATION FOR ANY NON-COMPLIANCE WITH THE RULE, INSOFAR AS IT MAY BE NECESSARY)

30. On Thursday 7 February 2019, the CER addressed a letter to Youens Attorneys (attorneys for the applicants), Malan Scholes Inc. (attorneys for the first respondent) and Tomlinson Mnguni James (attorneys for the seventh respondent), the parties in

the application for leave to appeal in terms of Uniform Rule 16A(2), in which the CER sought the consent of the parties by Tuesday, 12 February 2019. A copy of this letter is attached and marked "**CH1**".

31. Consent was received from the applicants and the seventh respondent but was refused by the first respondent. Copies of these letters are attached and marked "**CH2 - CH4**".

32. The CER has therefore complied with section 16A(1). Given that consent as envisaged by Uniform Rule 16A(2) was not obtained from all parties, the CER now brings this application to intervene. According to Rule 16A(5), if the consent (as sought in terms of Rule 16A(1)) is not forthcoming (as in the present case insofar as the first respondent is concerned), then the party may, within five (5) days of the expiry of the twenty (20) day period, apply to the Court to be admitted as *amicus curiae*. As set out below, the period of 20 days has been truncated and condonation for this has been sought.

33. As I have set out, the judgment in this matter was handed down on 20 October 2018. It was only in this judgment that the constitutional implications of the findings and reasoning therein first became apparent to the CER. The need for the present application became apparent only upon reading the judgment.

34. The applicants filed a notice of application for leave to appeal on 11 December 2018. The filing of this notice of appeal presented the CER with an opportunity to seek leave to intervene.

 JLF

35. The Constitutional Court has recognised that an *amicus* – even one which did not involve itself in the litigation in the court *a quo* – is entitled to seek leave to appeal, although the circumstances in which it may do so are limited. In the present case the applicants have sought leave to appeal. The CER's involvement is intended to therefore be much narrower – and its submissions more directed and tailored – to addressing very specific environmental issues (and advocating for very specific interpretations of NEMA and the MPRDA).

36. The CER's offices were closed from 13 December 2018 – two days after the notice of appeal was delivered. The offices were closed until 14 January 2019. It was only mid-January 2019, when its offices re-opened, that the CER had occasion to peruse the Court's judgment, the application for leave to appeal and other relevant documentation.

37. Having realised the potential implications of the judgment, the CER sought as quickly as possible to engage counsel and to seek the consent of the parties to intervene as *amicus*.

38. The CER asked the parties to respond to this request for consent within a truncated time period to ensure that the present application could be lodged by no later than Tuesday 19 February 2019.

39. As mentioned, consent was granted by the applicants and seventh respondent but refused by the first respondent on 12 February 2019. This has necessitated the present application, which will be filed as soon as possible after Tuesday 19 February 2019 so that the application is before the Court a *quo* (and the parties) well

in advance of the date set for the hearing of the application for leave to appeal (which to date has not been agreed).

40. Accordingly, and insofar as it may be necessary, the CER seeks condonation for the truncated time periods in the Rule 16A notices as well as for the filing of this application to intervene under shortened time periods. This was unavoidable, for the reasons I have set out above.

LEGAL SUBMISSIONS THAT THE CER INTENDS TO ADVANCE IF LEAVE TO INTERVENE IS GRANTED

Findings in respect of which the CER takes issue

41. The CER intends to focus on the following legal conclusions made by this Court in the judgment:

41.1. that prior to 8 December 2014 (and the introduction of the OES), the environmental impacts of mining were regulated exclusively through the Mineral and Petroleum Resources Development Act, 2002 ("the MPRDA") (paragraph 50 of the judgment);

41.2. that through the application of section 12(4) of the National Environmental Management Amendment Act 2008 ("NEMLAA 2008") the first respondent's Environmental Management Programme ("EMPr") under the MPRDA was deemed to be an "environmental authorisation" under NEMA (paragraph 71.1 of the Court *a quo* judgment);

41.3. the interpretation of section 24L(4) of NEMA and consequent application to the facts (paragraph 71.6 of the Court *a quo* judgment);

41.4. that the Ministers must have been satisfied with Tendele's activities so the judge ought also to be (paragraph 71.8 of the Court *a quo* judgment);

41.5. the failure to consider that mining rights and associated EMPrs were issued after the relevant land use planning legislation came into place and therefore applied in respect of certain mining areas (paragraph 88 of the Court *a quo* judgment);

41.6. the Court's interpretation of the relevant waste law and its applicability at the relevant points in time (paragraph 102 of the Court *a quo* judgment);

41.7. the finding that the applicants had suitable alternate remedies (paragraph 108 of the Court *a quo* judgment); and

41.8. the order directing the applicants to pay the costs.

42. The CER is of the view that this matter goes beyond the individual interests of the parties and will have a profound influence on the ability of compliance and enforcement officials to monitor and enforce compliance with environmental laws in mining areas, not just in the case of the first respondent but in the broader mining environment.

43. The CER fears that the Court a *quo*'s findings may, even if unwittingly, provide non-compliant mining companies with an excuse to operate or to continue to operate in breach of the relevant environmental laws. This, in turn, will negatively impact the public's constitutionally entrenched environmental right.

44. The Court's interpretation therefore has the potential to weaken the environmental laws insofar as they apply to mining companies and in circumstances where mining activities, by their nature, have the potential to cause far reaching negative environmental impacts.

45. The further effect is to strip the powers from enforcement officials both within the Department of Environmental Affairs ("DEA") as well as in the Department of Mineral Resources ("DMR"). Accordingly, and in order to explain these negative consequences, the CER intends to make submissions on how the suite of environmental laws, properly interpreted, ought to operate in contrast to how these laws have been interpreted in the judgment.

The CER's submissions

46. If admitted as *amicus*, the CER intends to make the following submissions against the legislative framework set out below. I respectfully submit that these legal submissions:

46.1. are relevant because it is precisely the issue/s the Court a *quo* was called upon to consider in the application; and

46.2. will assist the Court by placing before it submissions not previously before it and which had not been advanced by other parties to the matter; and

46.3. would otherwise not properly be before the Court.

47. Through its submissions the CER intends to illustrate how the applicable test in section 17(1)(a) of the Superior Courts Act, 2013 has been met in the circumstances.

48. The CER does so against the trite fact – accepted by our courts – regarding the detrimental impacts that can occur where mining takes place without all necessary environmental and land use approvals being in place, including the impact on the human right to an environment not harmful to health or well-being.

The constitutional right and principles guiding interpretation

49. Section 24 of the Constitution guarantees the right to an environment not harmful to health or wellbeing. It places a duty on the state to take reasonable legislative and other measures to achieve the realisation of this right.

50. Acting in accordance with this duty, NEMA was enacted as the overarching statute which seeks to give effect to the environmental right. As stated in its preamble, NEMA provides a framework for integrating good environmental management into all development activities (which includes mining).

51. NEMA can be seen as having replaced its pre-constitutional predecessor the Environment Conservation Act, 1989 ("ECA") which was enacted, per its preamble, "*to provide for the effective protection and controlled utilization of the environment and for matters incidental thereto*".

52. Under the umbrella of NEMA, a number of specific environmental management Acts ("SEMAs") have been enacted, each to zoom in on a particular area within the broader environmental context. One example is the National Environmental Management Waste Act, 2008 ("NEMWA").

53. Section 2 of NEMA contains the national environmental management principles. These principles apply throughout South Africa to the actions of all organs of state that may significantly affect the environment and, amongst others, *"guide the interpretation, administration and implementation of this Act* (NEMA), *and any other law concerned with the protection or management of the environment."*

54. The principles go further to provide that *"development must be socially, environmentally and economically sustainable".*

55. Accordingly, these principles must, of necessity, guide any interpretation of NEMA and any other law concerned with either the protection or management of the environment; including when interpreting the suite of mining legislation (such as the MPRDA).

56. The MPRDA deals specifically with mining. Although it is not a SEMA, one of its objectives is to *"give effect to section 24 of the Constitution by ensuring that the nation's mineral and petroleum resources are developed in an orderly and ecologically sustainable manner while promoting justifiable social and economic development."*

57. There is no provision either in the MPRDA, or in the mining legislation which preceded it, that seeks or sought to exclude the application of environmental and land use planning legislation in mining areas. On the contrary, the MPRDA acknowledges that mineral resources must be exploited in an ecologically sustainable manner.

58. Against this background, I now turn to consider the relevant environmental legislation applicable to mining. I consider first the position prior to the introduction of the One Environmental System ("OES") and thereafter explain the OES and the changes brought about by it.

Legal Framework Prior to the OES (i.e. prior to 8 December 2014)

ECA

59. As foreshadowed above, ECA was enacted prior to the Bill of Rights, although even at this time the importance of environmental protection was acknowledged.

60. Section 21 of ECA provided that "*the Minister may by notice in the Gazette identify those activities which in his opinion may have a substantial detrimental effect on the environment, whether in general or in respect of certain areas.*" Once listed, approval would be required before a person could commence with these activities.

61. Pursuant to section 21, two sets of listing notices and accompanying regulations were published under ECA. The first commenced on 8 September 1997 and operated until end of day 9 May 2002.[1] This was then replaced by GNR 670 and GNR 672 of 10 May 2002, Government Gazette No 23401 which commenced on 10 May 2002 and operated until 2 July 2006 ("the ECA listing notice").

62. Although mining was not specifically listed, the ECA listing notice contained a host of related activities that were triggered by mining activities. Accordingly, before mining could take place, a mining company would have to obtain both permission under the MPRDA as well as authorisation under ECA for any activities contained in the ECA listing notice that would be triggered.

[1] GNR 1182 & 1183: Government Gazette No 18261,Pretoria, 5 September 1997

JCT

NEMA

63. NEMA was enacted largely to replace and update ECA in the post-constitutional era.

64. In a similar fashion, section 24(2) of NEMA empowers the Minister responsible for environmental affairs to list activities which may have a detrimental impact on the environment and which may not commence unless and until environmental authorisation is granted.

65. To date, three sets of regulations have been published under this section, each being applicable over a certain time period as follows:

The Environmental Impact Assessment Regulations and accompanying Listing Notices

2006 Listed Activities	GNR 385, 386 and 387 Government Gazette No 28753	Applicable from 3 July 2006 – 1 August 2010 (replaced the ECA listing notice)
2010 Listed Activities	GNR 543, 544, 545 and 546 Government Gazette No 33306	Applicable from 2 August 2010 – 3 December 2014
2014 Listed Activities	GNR 982, 983, 984 and 985 Government Gazette No 38282	Applicable from 8 December 2014 to date (with certain 2017 amendments)

66. As mentioned above, mining operations do not occur in isolation of other associated activities. Mining will generally trigger an activity (or rather activities) listed in the Listing Notices published under either ECA or NEMA.

67. This being so, mining cannot lawfully commence unless authorisation is obtained in terms of this legislation. This is in addition to a mining right and EMPr approved under the MPRDA. These listed activities are commonly referred to as "associated or related activities" because they are activities which are triggered by, or connected to, the mining activity but are not necessarily the mining activity itself.

68. If mining commenced in contravention of a listing notice applicable at the time, and the activity remains listed, or similarly listed, in a more recent listing notice, then the continuation of that activity remains unlawful. The only way for the transgressor to rectify this (i.e. to become compliant) is in terms of an application for *ex post facto* authorisation in terms of section 24G of NEMA.

69. In order to explain how activities listed under an earlier Listing Notice remain similarly listed or fall away under a more recent notice, the DEA prepared a document titled "*EIA Listed activities & Time Lines*". A copy of this document is publicly available at https://cer.org.za/wp-content/uploads/2010/03/Activities-and-Timelines-updated-January-2015_3.pdf

70. As foreshadowed above, there is nothing in law which excludes mining activities from the ambit of environmental legislation. The ordinary and common sense interpretation of the legislation would suggest that it is not excluded and, on the contrary, and in the light of the constitutionally protected environmental right (and NEMA principles), the environmental legislation can not only linguistically be read to apply in addition to, and alongside, the mining legislation – but it also *should* be read in such a way.

71. If admitted as an *amicus curiae*, the CER will demonstrate that to operate lawfully prior to the commencement of the OES, the first respondent was required, prior to

commencing, to obtain environmental authorisation for any and all listed activities triggered by its mining operations.

72. This was clearly spelt out in *Mineral Sands Resources (Pty) Ltd v Magistrate for the District of Vredendal, Kroutz No and Others* (18701/16) [2017] ZAWCHC 25 (20 March 2017) ("*Mineral Sands*"). The Western Cape High Court in *Mineral Sands* held that prior to 8 December 2014, both a NEMA environmental authorisation and an EMPr under the MPRDA were required. This was not considered by the Court *a quo* in its judgment.

The National Environmental Management Waste Act, 2008 ("NEMWA")

73. NEMWA deals specifically with waste management. In a similar way to ECA and NEMA discussed above, section 19 of NEMWA enables the fourth respondent to publish a list of waste management activities that have, or are likely to have, a detrimental effect on the environment.

74. The effect of this listing is that, prior to commencing with a listed waste management activity, a waste management licence must be obtained.

75. Prior to NEMWA, waste management activities may have been listed in ECA. For example disposal of waste was an activity listed under ECA and authorisation was required before waste could be disposed at a site used for the accumulation of waste with the purpose of disposing or treating that waste.

76. On 3 July 2009, the first set of listed activities was published under NEMWA. The transitional provision contained in Regulation 5(2) provided that "*persons who lawfully conduct waste management activities listed in this Schedule on the date of the coming into effect of this Notice may continue with those activities until such time that the*

Minister by notice in the Gazette calls upon those persons to apply for waste management licences." [my emphasis]

77. Accordingly, to determine the lawfulness of the first respondent's conduct now, it is imperative to determine whether the first respondent was lawfully conducting waste activities as at 3 July 2009.

Changes introduced by the One Environmental System ("OES")

78. Prior to the introduction of the OES, a mining company was required (as the CER has demonstrated above) to obtain:

78.1. environmental authorisation under NEMA (or ECA as the case may be);

78.2. a waste management licence from the environmental authorities; and

78.3. a mining right and associated EMPr from the mineral authorities.

79. After 8 December 2014, the authorisation was obtained through the Department of Mineral Resources. The requirement for an MPRDA EMPr was removed but the Environmental Impact Assessment Regulations Listing Notices 1 and 2 of 2014 require an environmental authorisation together with an approved EMP in term of NEMA for an activity which requires a mining right (or similar authorisation) in terms of the MPRDA.

80. Under the OES, the Minister of Mineral Resources is tasked with issuing environmental authorisations and waste management licences under NEMA and NEMWA, respectively, for both mining and related activities. The Minister of Environmental Affairs is the appeal authority for these authorisations.

JLT

81. Put differently, instead of a mining company having to apply to the DMR for a mining right (which includes following an assessment process to get an EMPr approved) and to the DEA for an environmental authorisation for listed related activities and a waste management licence for listed waste management activities, a company can now apply to the DMR for approval in respect of all of these activities.

82. The environmental aspects have been excised from the MPRDA and instead the Minister of Mineral Resources is expected to consider these impacts under the more holistic environmental impact assessment process under NEMA EIA Regulations.

83. The OES is intended to be a more streamlined process.

84. All environmental management plans or programmes approved in terms of the MPRDA immediately before 8 December 2014, are deemed to be approved in terms of NEMA as provided for in section 12(4) of the National Environmental Management Amendment Act, 2008 which reads as follows:

> *"An 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 (i.e. NEMA) as amended by this Act."*

85. The provision means that the mining activities that were authorised under the MPRDA are now deemed to be authorised under NEMA. A mining company does therefore not now have to re-apply for the mining activities now listed under the NEMA EIA regime.

86. It was, however, noted by the DEA that this transitional provision could result in confusion because it could be read to mean that NEMA environmental authorisation for

listed activities is no longer required as long as the mining company held an MPRDA EMPr.

87. This would mean that companies that operated unlawfully because they had failed to obtain NEMA authorisation would be deemed to be operating lawfully. This interpretation was untenable and an amendment is proposed in clause 82 of the National Environmental Management Laws Amendment Bill, 2017 ("NEMLAB 4") to eliminate any uncertainty.

88. Clause 82 provides as follows:

"82. The following section is hereby substituted for section 12 of the National Environmental Management Amendment Act, 2008:

12. (1) Where, prior to 8 December 2014—

(a) an environmental authorisation or a waste management licence was required for activities directly related to—

(i) prospecting or exploration of a mineral or petroleum resource; or

(ii) extraction and primary processing of a mineral or petroleum resource,

and such environmental authorisation or waste management licence has been obtained; and

(b) a right, permit or exemption was required in terms of the Mineral and Petroleum Resources Development Act, 2002 (Act No. 28 of 2002) for—

(i) prospecting or exploration of a mineral or petroleum resource; or

(ii) extraction and primary processing of a mineral or petroleum resource,

and such right, permit or exemption has been obtained, and activities authorised in such environmental authorisation, waste management licence, right, permit or exemption commenced after 8 December 2014, such environmental authorisation, waste management licence, right, permit or exemption is regarded as fulfilling the requirements of the Act: Provided that where an application for an environmental authorisation or waste management licence was refused or not obtained in terms of the Act for activities directly related to prospecting, exploration or extraction of a mineral or petroleum resource, including primary processing, this subsection does not apply.

(2) Despite subsection (1), the Minister responsible for mineral resources may direct the holder of a right, permit or any old order right, if he or she is of the opinion that the prospecting, mining, exploration and production operations are likely to result in unacceptable pollution,

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ecological degradation or damage to the environment, to take any action to upgrade the environmental management plan or environmental management programme to address the deficiencies in the plan or programme.

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

89. The Court had not been made aware of the proposed amendment contained in NEMLAB 4. Nor had the Court's attention been drawn to the *ratio* in *Mineral Sands* where the Court, at paragraph 30, held that "*the effect of s 12(4) is that a [MPRDA EMPr] approved prior to 8 December 2014 is to be regarded as an EMP approved in terms of s 24N of NEMA.*"

90. If the Court had been made aware of clause 82 of NEMLAB 4 and the decision in *Mineral Sands*, this would undoubtedly have guided its interpretation of the provision contained in 12(4) of NEMLAA 2008.

91. The Court held that the purpose of the transitional provision contained in section 12(4) was that the EMP approved under the MPRDA has the status of an environmental authorisation under NEMA. However, it went further to say that the purpose of this provision is to entitle the holder of an EMP that was lawfully conducting mining operations in terms of the applicable law prior to 8 December 2014, to continue.

92. If admitted as *amicus*, the CER will demonstrate how the first respondent was not operating lawfully because it required, amongst others, the relevant environmental authorisation and waste management licence for related activities, which it had not obtained.

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Section 24L(4) of NEMA

93. Section 24L(4) of NEMA provides that a "*competent authority under Chapter 5 to issue an environmental authorisation may regard an authorisation in terms of any other legislation that meets all the requirements contained in section 24A(4)(b), and where applicable, section 24(4)(b) to be an environmental authorisation in terms of that Chapter*".

94. If admitted as *amicus* the CER will demonstrate that an EMPr does not meet these requirements, because the NEMA EIA Regulations are typically more detailed than those required by the MPRDA. In any event, on the facts before the Court no evidence was adduced to show that the fourth respondent deemed the first respondent's EMPr to be an environmental authorisation in terms of this provision.

No adequate alternative remedy

95. Equally the CER is of the view that another court would reasonably differ to the Court a *quo* in its assessment of whether section 28 of NEMA provides a suitable alternative remedy.

96. In 2016, the CER published a report, *Zero Hour: Poor Governance of Mining and the Violation of Environmental Rights in Mpumalanga* ("*the Report*" or "*Zero Hour*"). It is publicly available at https://cer.org.za/wp-content/uploads/2016/06/Zero-Hour-May-2016.pdf. The report was an in-depth review of evidence spanning more than five years, including academic studies, reports, litigation and pre-litigation cases, access to information requests, portfolio committee submissions, and parliamentary questions and answers. It entailed field work in the province of Mpumalanga, community meetings and consultations, meetings with local government officials, and meetings with mining

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companies. Repeated attempts to engage the DMR's Mpumalanga Regional Office were unsuccessful. Its conclusion and recommendations apply in large part to other provinces where mining is prolific. This includes Limpopo, Gauteng, North West, Northern Cape and KwaZulu-Natal.

97. The findings of *Zero Hour* that speak directly to why section 28 of NEMA does not provide an adequate alternative remedy include: insufficient investment in compliance monitoring and enforcement capacity in the DMR; inadequate compliance inspection information made publicly available by the DMR; a failure by the DMR (and by the Department of Water and Sanitation) to stop mines without water use licences from operating, notwithstanding the fact that the MPRDA is subject to the National Water Act, 1998; an inadequate response by the DMR to complaints of violations of licences or illegal activity; inadequate statutory notices issued by DMR directing mining companies to stop unlawful activities (when they are issued, they are often of poor quality and do not withstand a court challenge); the DMR fails to institute enough criminal court proceedings (and the DMR furthermore does not actively participate in and, in some cases, passively resists criminal prosecution, even in cases where this is the appropriate course of action).

98. Statutory remedies do not therefore avail themselves to parties such as the applicants – and therefore there is no suitable alternative remedy to the relief sought. This evidence is not presently before this Honourable Court, but if the leave to appeal application is granted, the CER will seek leave to place this before the SCA in terms of Rule 16.

COSTS ORDERS IN PUBLIC INTEREST LITIGATION

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99. Finally, the CER takes issue with the Court a *quo*'s treatment of the issue of costs. The Court a *quo* granted costs against the applicants.

100. While costs are a matter within the discretion of the presiding officer, regard should nonetheless be had to established principles and relevant statutory provisions in making costs orders. One such provision is section 32(2) of NEMA, which deals specifically with the issue of costs. Section 32(2) of NEMA provides:

> *"a court may decide not to award costs against a person who, or group of persons which, fails to secure the relief sought in respect of any breach or threatened breach of any provision of this Act, including a principle contained in Chapter 1, or any provision of a specific environmental management Act, or any other statutory provision concerned with the protection of the environment or the use of natural resources, if the court is of the opinion that the person or group of persons acted reasonably out of a concern for the public interest or in the interest of protecting the environment and had made due efforts to use other means reasonably available for obtaining the relief sought."*

101. In this matter, all evidence would suggest that the applicants have acted reasonably, out of a concern for the public interest and in the interest of protecting the environment. They also made due efforts to use other means reasonably available for obtaining the relief sought.

102. Courts should also have regard to the applicable constitutional jurisprudence on the issue of costs in formulating a costs award – and particularly the case of The Trustees for the time being of the *Biowatch Trust v The Registrar, Genetic Resources, The*

Executive Council for Genetically Modified Organisms, The Minister for Agriculture, Monsanto South Africa (Pty) Ltd, Stoneville Pedigreed Seed Company and D&PL SA South Africa Inc (the Centre for Child Law, Lawyers for Human Rights and the Centre for Applied Legal Studies as amici curiae) ("*Biowatch*").

103. The issue in *Biowatch* was that *Biowatch* had been ordered to pay Monsanto's costs in the lower court. In an appeal against the cost award, the Constitutional Court held unanimously the High Court had misdirected itself in not giving appropriate attention to the fact that this was a constitutional matter in which Biowatch was seeking to vindicate constitutional rights. The Constitutional Court also repeated the general rule in constitutional litigation is that an unsuccessful litigant in proceedings against the state ought not to be ordered to pay costs, unless the application is frivolous or vexatious or in any other way manifestly inappropriate.

104. There is good reason for this *ratio*. Parties should be encouraged to defend and vindicate constitutional rights in *bona fide* matters. If the protection afforded to such deserving matters by the *Biowatch* principle is not observed, it will have a chilling effect on constitutional litigation – meaning that people will be dissuaded from enforcing their rights through the court for fear of a costs order.

105. Recently, the Constitutional Court has had occasion to criticise lower courts that had overlooked the *Biowatch* principle, precisely because of the chilling effect on rights. The Court has reversed two decisions of the Supreme Court of Appeal on the question of costs alone. These judgments will be drawn to the Court's attention should the CER be permitted to assist as *amicus*.

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106. In the circumstances, and given the chilling effect of a costs order in public interest litigation, the CER respectfully submits that the Court did not have due regard to the principles in terms of section 32(2) of NEMA and under the common law as laid down in *Biowatch*.

THE MINISTERS ARE SATISFIED SO THE JUDGE OUGHT ALSO TO BE

107. The CER's experience, and that of our clients and partners working in the mining-environment context is that, for a range of reasons, competent authorities are not enforcing compliance by mining companies with environmental laws. Some of the reasons for this are that some representatives lack the capacity, training, experience and indeed political will to do so.

108. In fact, the DMR have yet to publish a National Compliance and Enforcement Report detailing compliance and enforcement statistics. Accordingly, the public are in the dark as to whether any compliance monitoring and enforcement is actually being undertaken as required.

109. Indeed, even decisions taken within the DMR are poor and do not give effect to their constitutional and legislative obligations. For example, the DMR has publicly acknowledged that certain areas are environmentally sensitive and that mining was potentially threatening them, yet it continues to accept mining applications and grant rights in these areas.

110. Accordingly, it is respectfully submitted that there is no basis to assume that the second and fourth respondents are satisfied, or have even considered the issues taking place at Somkhele.

111. Furthermore as a matter of law, a Court cannot be satisfied with legal compliance simply on account of a functionaries own ostensible say-so. The Constitutional Court in two recent decisions – that will be drawn to the Court's attention if the CER is admitted – explained that such reasoning is tantamount to introducing a standard of deference to functionaries such as the second and fourth respondents which is neither supported by law nor defensible in practice.

112. Further attention will be drawn to a decision of just this past week where the Constitutional Court was highly critical of the Department of Mineral Resources in a judgment that showed that no deference is to be afforded to such officials. These legal authorities on this point will be presented at the hearing of this application.

TERMS AND CONDITIONS OF INTERVENTION

113. To assist the Court, the CER seeks permission to present brief oral argument in support of the points referenced above, to draw attention to the judgments adverted to, and to make submissions in support of leave being granted.

CONCLUSION

114. The CER respectfully submits that if it is provided with the opportunity to intervene as an *amicus curiae* it will be in a position to put new and relevant perspectives and authorities before the court to assist in the determination of whether leave to appeal ought to be granted. It will also be able to situate the issues on appeal within a broader environmental context.

115. The CER will not make submissions that have already been made by the parties to the litigation, and will instead aim to explain the broader impacts of the court's judgment, the wider interests of justice engaged thereby, and the compelling reasons

why the constitutional issues raised in the judgment require consideration on appeal, both because of its public importance but also because another court would reach a different interpretation.

116. CER will seek to do so in truncated oral submissions which address only the narrow issues canvassed in this application.

117. Against this background, I submit that the CER has satisfied the requirements for admission as an *amicus curiae* in Uniform Rule 16A.

118. Accordingly, I pray for an order admitting the CER as an *amicus curiae* in the application for leave to appeal as set out in the notice of motion.

CATHERINE HORSFIELD

The terms of Regulation R.1258 published in Government Gazette No. 3619 of the 21st July 1972, as amended, having been complied with, I hereby certify that the Deponent has acknowledged that she knows and understands the contents of this affidavit, which was signed and sworn to at NOORDHOEK on this 19th day of February 2019.

COMMISSIONER OF OATHS

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Our ref: CER/CH/NLR
7 February 2019

URGENT

Dear Sirs/Mesdames

CONSENT TO BE ADMITTED AS AMICUS CURIAE FOR THE LEAVE TO APPEAL PROCEEDINGS: IN RE: GLOBAL ENVIRONMENTAL TRUST AND OTHERS V TENDELE COAL MINING (PTY) LIMITED AND OTHERS, CASE NO 11488/17P HIGH COURT OF SOUTH AFRICA KWAZULU-NATAL DIVISION, PIETERMARITZBURG

1. The Centre for Environmental Rights ("CER") has reviewed the papers filed in the above matter, including the judgment handed down on 20 October 2018 and the application for leave to appeal. Arising from the findings in the judgment and the Court's order, CER believes that there are issues of constitutional importance that merit the attention of an appeal court. It hereby seeks written consent in terms of Rule 16A of the Uniform Rules of Court to be admitted as an *amicus curiae* in the application for leave to appeal.

2. CER is a non-profit organisation dedicated solely to the advancement of environmental rights as guaranteed in the South African Constitution. To achieve this, the CER supports and represents civil society organisations and communities who wish to protect their environmental rights, and engages in legal research, advocacy and litigation to achieve strategic change.

3. Mining has been one of the key programmes of the CER since our inception. The aim of our mining programme is to ensure that mining is regulated and takes place in accordance with the law and does not violate constitutionally guaranteed environmental rights.

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4. CER has steadily built a reputation as a key player in the battle for improved environmental regulation of mining in South Africa. Through our case work and advocacy, we have acquired considerable expertise in the intersection of mining and environmental law. We seek to utilise this expertise in support of the environment, communities affected by environmental impacts and essentially the realisation of section 24 of the Constitution.

5. The judgment handed down in this matter on 20 October 2018 raised important issues around the interpretation of a suite of environmental and mining laws. The importance of these issues requires clarification on appeal, more particularly to ensure that any interpretation adopted by the court of the laws does not negatively impact on the environmental right entrenched in the Constitution.

6. CER's focus will be on the following findings:

    a. that prior to 8 December 2014 the environmental impacts of mining were regulated exclusively through the Mineral and Petroleum Resources Development Act, 2002;

    b. that through the application of section 12 of the National Environmental Management Amendment Act 2008 the first respondent's Environmental Management Programme ("EMPr") under the MPRDA was deemed to be an environmental authorisation under NEMA;

    c. the interpretation of section 24L(4) of NEMA and consequent application to the facts;

    d. that the Ministers must have been satisfied with Tendele's activities so the judge ought also to be;

    e. the failure to consider that mining rights and associated EMPrs were issued after the relevant land use planning legislation came into place and therefore applied in respect of certain mining areas;

    f. the learned judge's interpretation of the relevant waste law and its applicability at the relevant points in time;

    g. the finding that the applicants had suitable alternate remedies; and

    h. the order directing the applicants to pay the costs.

7. To assist the Court in determining the leave to appeal application, CER therefore intends to make submissions regarding the interpretation and application of the relevant legislation in the light of section 24 of the Constitution, 1996. In these submissions CER will:

    a. succinctly outline how the various pieces of legislation (and in particular the listed activities and waste management activities) applied at each relevant point in time; including by (as far as possible) linking the listed activities to the activities conducted at the Somkhele mine;

    b. provide an explanation of the "one environmental system", including the reasons for its coming into being;

    c. introduce and explain how the National Environmental Management Bill, 2014 seeks to provide clarity on the interpretation of section 12(4) of the National Environmental Laws Amendment Act, 2008;

    d. explain any alternative remedies that may have been available to the applicants and explain why none of them is an adequate alternate remedy;

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e. draw attention to the latest Constitutional Court authorities on costs and the chilling effect of costs orders in matters where constitutional rights are sought to be vindicated.

8. CER also wishes to make submissions regarding the detrimental impacts that can occur where mining takes place without all necessary environmental and land use approvals being in place, including the impact on the environment itself as well as on neighbouring communities.

9. CER believes that this matter goes beyond the individual interests of the cited parties. The Court's findings in its judgment on these important issues influence the ability of compliance and enforcement officials to monitor and enforce compliance with the environmental laws, not just in the case of the first respondent but in the broader mining environment. CER fears that the Court's findings may, even if only unwittingly, provide non-compliant mining companies the chance to continue operating in breach of the relevant environmental laws – with consequent negative impacts on the public's environmental right, enforcement and the environmental laws in mining areas.

10. CER respectfully submits that if it is provided with the opportunity to intervene as an *amicus curiae* it will be in a position to put new and relevant perspectives before the court to assist in the determination of whether leave to appeal ought to be granted, and to situate the issues on appeal within a broader environmental context. CER will seek to avoid making submissions that have already been made by the parties to the litigation and will instead aim to explain the broader impacts of the court's judgment, the wider interests of justice engaged thereby, and the compelling reasons why the constitutional issues raised in the judgment require consideration on appeal. CER will seek, in truncated submissions, to explain the severe negative impacts of mining activities on the environment as well as on affected communities where the mine is not properly authorised.

11. We therefore seek your written consent in terms of Rule 16A(2) for CER to be admitted as an *amicus curiae* on the following terms and conditions:

    a. CER will be entitled to lodge heads of argument dealing with the issues referred to above and limited in the context of the application for leave to appeal. We propose that staggered dates for the delivery of heads of argument be agreed prior to the hearing of the leave to appeal application. We propose that CER's heads of argument in the leave to appeal application will be lodged three days after the heads of argument of the applicants in the main application, with sufficient time in advance of the hearing for the respondents to file heads of argument in response to both the applicants' and CER's heads of argument.

    b. CER will be entitled to address oral argument at the hearing of the application for leave to appeal.

12. CER has only since its re-opening in mid-January 2019 been in a position to peruse the Court's judgment and the application for leave to appeal filed on 11 December 2018– and thereafter sought as quickly as possible to engage counsel.

13. Unfortunately, due to the time constraints imposed by Rule 16A, we require your response by no later than Tuesday 12 February 2019. In anticipation of your response to this letter, please include CER on all correspondence with the Registrar regarding the date for the leave to appeal application, so that our counsel might also be accommodated.

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14. We look forward to hearing from you.

Yours faithfully
CENTRE FOR ENVIRONMENTAL RIGHTS

per:
Catherine Horsfield
Attorney
Programme Head: Mining
Direct email: chorsfield@cer.org.za

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YOUENS ATTORNEYS

Specialists in Environmental Law and Environmental Justice

Attention: Catherine Horsfield
Centre for Environmental Rights
Per email: chorsfield@cer.org.za
Ref: CER/CH/NLR
Our reference: R F BRENT/CJB/09Y003001

8 February 2019

Dear Ms Horsfield

RE: CONSENT TO BE ADMITTED AS AMICUS CURIAE FOR THE LEAVE TO APPEAL PROCEEDINGS IN: GLOBAL ENVIRONMENTAL TRUST & OTHERS / TENDELE COAL MINING (PTY) LTD & OTHERS (CASE NUMBER 11488/17P)

1. Your letter dated 7 February 2019 refers.

2. We hereby confirm that we consent to your request in terms of Rule 16A(2) of the Uniform Rules of Court to be admitted as an *amicus curiae* in the application for leave to appeal in the abovementioned matter.

Yours truly

Kirsten Youens

Cc: Malan Scholes Inc
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Cc: Tomlinson Mnguni James
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FOR THE URGENT ATTENTION OF :
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Your Reference	Our Reference	Date
CER/CH/NLR	ATM/Claudette/07I0004-17	12 February 2019

Dear Madam,

RE: CONSENT TO BE ADMITTED AS AMICUS CURIAE FOR THE LEAVE TO APPEAL PROCEEDINGS :
IN GLOBAL ENVIRONMENTAL TRUST AND OTHERS V TENDELE COAL MINING (PTY) LIMITED AND OTHERS, CASE NO 11488/17P

We refer to the above-mentioned matter and advise that our client has given their consent.

Yours faithfully

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Attention: K Youens

CC:

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Attorneys for the Seventh Respondent

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Attention: Claudette

Your ref: CER / CH / NLR
Our ref: L Bolz / MAT 2107

12 February 2019

Dear Ms Horsfield

GLOBAL ENVIRONMENTAL TRUST AND TWO OTHERS // TENDELE COAL MINING (PTY) LTD ("Tendele") AND OTHERS – CASE NO: 11488/17P - CONSENT TO BE ADMITTED AS AMICUS CURIAE IN THE LEAVE TO APPEAL PROCEEDINGS

1 We confirm that we act for Tendele and refer to your request for consent to be admitted as *amicus curiae* in terms of Rule 16A(2) of the Uniform Rules of Court ("**Rules**"), dated 7 February 2019.

2 Please take note that we have been instructed to advise you that Tendele does not consent to your request to be admitted as *amicus curiae* in the aforementioned proceedings.

3 We have, furthermore, been instructed to draw your attention to Rule 16A(5) of the Rules which provides that –

> *"[i]f the interested party contemplated in subrule (2) is unable to obtain the written consent as contemplated therein, he or he may, within five days of the expiry of the 20-day period prescribed in that subrule, apply to the court to be admitted as an amicus curiae in the proceedings."*

4 We accordingly await the Centre for Environmental Rights' application to be admitted as *amicus curiae*.

5 All of Tendele's rights remain reserved.

Yours faithfully

MALAN SCHOLES INCORPORATED