

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

CASE NO. 11488/17P

In the matter between:

GLOBAL ENVIRONMENTAL TRUST FIRST APPLICANT

MFOLOZI COMMUNITY ENVIRONMENTAL JUSTICE ORGANISATION SECOND APPLICANT

SABELO DUMISANI DLADLA THIRD APPLICANT

and

TENDELE COAL MINING (PTY) LTD FIRST RESPONDENT

MINISTER OF MINERALS AND ENERGY SECOND RESPONDENT

MEC: DEPARTMENT OF ECONOMIC DEVELOPMENT, TOURISM AND ENVIRONMENTAL AFFAIRS THIRD RESPONDENT

MINISTER OF ENVIRONMENTAL AFFAIRS FOURTH RESPONDENT

MTUBATUBA MUNICIPALITY FIFTH RESPONDENT

HLABISA MUNICIPALITY SIXTH RESPONDENT

INGONYAMA TRUST SEVENTH RESPONDENT

EZEMVELO KZN WILDLIFE EIGHTH RESPONDENT

AMAFYA KWAZULU-NATALI HERITAGE COUNCIL NINTH RESPONDENT



FILING NOTICE

TO : THE REGISTRAR OF THE HIGH COURT
PIETERMARITZBURG

AND TO : **MALAN SCHOLES INC.**
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RECEIVED WITHOUT PREJUDICE

SIGNATURE: 

DATE: 08 . 08 . 2018

TIME: 14:30

Shepstone Wylie
ATTORNEYS

AND TO : **DMS ATTORNEYS**
Attorneys for the Amicus Curiae
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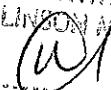
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DATE: 08 . 08 . 2018

TIME: 14:30

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AND TO : **TOMLINSON MNGUNI JAMES INC.**
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Received without prejudice a copy
hereof at **14:30** on the
day of **2018-08-03**
TOMLINSON MNGUNI JAMES ATTORNEYS


SIRS,

PLEASE TAKE NOTICE that the following are hereby presented for service and filing:

1. Applicants' Heads of Argument;
2. Applicants' Concise heads of argument;
3. Applicants' practice note; and
4. Chronology.

SIGNED AND DATED AT PIETERMARITZBURG ON 8th August 2018.



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CASE NO.: 11488/17P

In the matter between:

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APPLICANT	
SABELO DUMISANI DLADLA	THIRD APPLICANT

and

TENDELE COAL MINING (PTY) LTD	FIRST RESPONDENT
MINISTER OF MINERALS AND ENERGY	SECOND
RESPONDENT	
MEC: DEPARTMENT OF ECONOMIC DEVELOPMENT, TOURISM AND ENVIRONMENTAL AFFAIRS	THIRD
RESPONDENT	
MINISTER OF ENVIRONMENTAL AFFAIR	FOURTH
RESPONDENT	
MTUBATUBA MUNICIPALITY	FIFTH RESPONDENT
HLABISA MUNICIPALITY	SIXTH RESPONDENT
INGONYAMA TRUST	SEVENTH
RESPONDENT	
EZEMVELO KZN WILDLIF	EIGHTH
RESPONDENT	



**AMAFA aKWAZULU-NATALI HERITAGE COUNCIL NINTH
RESPONDENT**

APPLICANTS' HEADS OF ARGUMENT

1. INTRODUCTION

- 1.1 This application is brought by two organisations and an individual to interdict and restrain the open cast coal mining conducted by First Respondent ("Tendele") at the area of the Somkele Mine in the district of Mtubatuba adjacent to the Hluhluwe-Imfolozi Park until further order of this Honourable Court.
- 1.2 It is averred that Tendele is acting illegally in conducting the mining in that it has no Environmental Authorization issued in terms of Section 24 of the National Environmental Management Act 107 of 1998 ("NEMA") or any equivalent thereof such as Section 38 A of the Mineral and Petroleum Resources Development Act 28 of 2002 (MPRDA) as amended.
- 1.3 Furthermore Tendele is conducting the said mining without any land use authority or approval from any Municipality and has no written approval in terms of Section 35 of the KwaZulu-Natal Heritage Act 4 of 2008 to remove or alter traditional graves from their original position.

- 1.4 Tendele also has no waste management licence issued by the Minister of Environmental Affairs (Fourth Respondent) in terms of Section 43 (1) or the Minister of Minerals and Energy (Second Respondent) in terms of Section 43 (1A) of the National Environmental Management : Waste Act 9 of 2008 (“the Waste Act”) despite requiring a licence as a result of its activities.
- 1.5 Such non-compliance has resulted in Tendele carrying on its mining operations illegally with the result that the residents in the area of Reserve 3 are suffering irreparable harm. This includes the Third Applicant.
- 1.6 A tranquil rural environment adjacent to a provincial game reserve has been destroyed and polluted by dust and noise. Homes have been removed or destroyed and the environment and the amenity of all who live there and the public at large has been destroyed and continues to be destroyed day by day. The wilderness has been turned into a vast industrial rock dump. The pictures (pages 157 – 159) illustrate this. Massive blasting takes place and the quality of life is being destroyed.
- 1.7 The family of Third Applicant has taken the matter up with Mineral Resources, the Centre for Environmental Rights, the Public Protector and the Mpukonyoni Traditional Administrative centre. Applicants have also appealed against the grant of the latest Mining Right. This appeal was rejected.

1.8 Consequently Applicants seek the interdict to ensure that Tendele is fully compliant with the law.

2. THE RELIEF CLAIMED

The Applicants seek the following order :-

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

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

and/or

- 1.2 Areas 2 and 3 on Reserve No. 3 (Somkele) No.15822 measuring 779.8719 hectares as described in the Mining Right dated 30th March 2011;

and/or

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

and/or

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

Until further order of this Honourable Court.

2. THAT First Respondent pay the costs of this application together jointly and severally, with any other Respondent who opposes this application.
3. THAT Applicants be granted further and/or alternative relief.”

As an alternative the above Honourable Court may elect to grant a structured interdict which is dealt with below.

The interdict being sought by Applicants is semi-temporary in that it is sought “until further order of this Honourable Court.” Thus if Tendele complies with its legal obligations and establishes that it has done so, the interdict may be lifted.

3. LOCUS STANDI

- 3.1 The Applicants bring the applications in terms of Section 24 and rely on the provisions of Section 38 of the Constitution of the Republic of South Africa, 1996.
- 3.2 Section 24 (a) provides that everyone has a right to an environment that is not harmful to their health or wellbeing, the Applicant's interests herein are premised on this right, which is contained in the Bill of Rights. It provides as follows :-

“24 Environment

Everyone has the right –

- (a) to an environment that is not harmful to their health, or well-being; and
- (b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that –
 - (i) prevent pollution and ecological degradation;
 - (ii) promote conservation; and
 - (iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development."

3.3 "Environment" is not defined in the Constitution but NEMA, the constitutional framework legislation which gives effect to Section 24, defines "environment" as

"the surroundings within which humans exist and that are made up of –

- (i) the land, water and atmosphere of the earth;
- (ii) micro-organisms, plant and animal life;
- (iii) any part or combination of (i) and (ii) and the inter-relationships among and between them, and
- (iv) the physical, chemical, aesthetic and cultural properties and conditions of the foregoing that influence human health and well-being."

This statutory definition is clearly too narrow because the Section 24 right includes harm to health and well-being from the environment.

HTF Developers v Minister of Environmental Affairs and Tourism

2006 (5) SA 512 (T) at paras [17] – [29]

3.4 The Constitutional Court has described the constitutional imperative to protect the environment and how it is balanced against sustainable development in

Department of Agriculture, Conservation and Environment v HTF

Developers 2008 (2) SA 319 (CC) at para [23] to [28]

3.5 The Constitutional Court also emphasized the role of the Courts in protecting the environment and enforcing the legislation enacted to protect the environment.

Fuel Retailers Association v D-G, Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province 2007 (6) SA 4 (CC) at paras [102]-[104]

3.6 Section 38 confers rights on the categories of persons listed therein, to approach the court where there is an alleged violation of constitutional rights, or threat thereof. It has a broad approach to legal standing and

therefore extends beyond the general category of person who may approach the court seeking relief.

Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO And Others 1996 (1) SA 984 (CC), para [35] and [167]

**Giant Concerts CC v Rinaldo Investments (Pty) Ltd
2013 (3) BCLR 251 (CC) at paras [28] – [36]**

3.7 It has been held that a generous approach to standing is essential in maintaining the Rule of Law and constitutional legitimacy. The Applicants have standing in terms of Constitutional provisions and meet the Constitutional Section 38.

Ngxuza and Others v Permanent Secretary, Department of Welfare, Eastern Cape and Another 2001 (2) SA 609 (E); at 618 - 625

Permanent Secretary, Dept of welfare, Eastern Cape Provincial Government and Another v Ngxuza and Others 2001 (4) SA 1184 (SCA), Para [13] to [16]

4. STATUTORY FRAMEWORK

4.1 The mining rights held by First Respondent were respectively obtained on the following dates, June 2007, March 2011, March 2013, October 2016.

NEMA and MPRDA

- 4.2 Section 24 (1) read with Section 24 (2)(a) and (b) and Section 24F of the National Environmental Management Act 1998 (NEMA), provides that no person may commence with any Environmental Impact Assessment listed activity, without a requisite Environmental Authorisation. Commencement with any listed activity would therefore constitute unlawful conduct.
- 4.3 Though mining only became a listed activity following the NEMA amendments which came into effect in December 2014, the First Respondent would have had to execute a number of listed activities pursuant to engaging in mining operations, these would include the following listed activities, amongst a list of others.
 - 4.3.1 The construction of facilities or infrastructure for the storage of coal;
 - 4.3.2 The construction of facilities or infrastructure for the storage of hazardous waste;
 - 4.3.3 The construction of facilities or infrastructure for the off-stream storage of water, including dams and reservoirs;
- 4.4 The environmental authorisation pertains to the activity rather than the development, mining in this case and therefore, Section 24 of NEMA requires an environmental authorisation to be obtained for each activity prior to its commencement.

Joint Owners of Remainder Erf 5216 Hartenbos v Minister for Local Government, Environmental Affairs & Development Planning, Western Cape Province and Another 2011 (1) SA 128 (WCC); para [36]

- 4.5 Applicant contends that First Respondent commenced with listed activities at the mine without obtaining the requisite environmental authorisation.
- 4.6 Prior to the 2014 amendment, First Respondent would have been obliged to obtain an environmental authorisation from both the Minister of Environmental Affairs in terms of Section 24 of NEMA and from the Minister of Mineral Resources, in terms of the then Section 38 of the MPRDA read with Section 24 of NEMA.
- 4.7 The NEMA amendment Act of 2014 did not extinguish the requirement for an environmental authorisation in terms of Section 24, 24C(1) and Section 24F; it however only stipulates that the Minister of Mineral Resources shall henceforth be the competent authority where the listed activity relates to mining and prospecting related activities. Therefore First Respondent still requires to obtain an environmental authorisation, however following the 2014 NEMA amendment, shall only need to approach the Minister of Mineral Resources for such.

Mineral Sands Resources (Pty) Ltd v Magistrate for the District of Vredendal, Kroutz NO and Others [2017] 2 All SA 599 (WCC); para [22]

- 4.8 The One Environmental System came into effect on 8th December 2014.

4.9 The effect of this amendment is that :

4.9.1 Prior to 8th December 2014 an environmental authorisation had to be granted by the Department and the Minister of Environmental Affairs; and

4.9.2 After 8th December 2014 an environmental authorisation as contemplated by Section 24 of NEMA could be granted in mining matters by the Minister of Mineral Resources (24C and 24F of NEMA).

4.10 it is common cause that Tendele has no environmental authority for any of its mining activities, even those that predate 8th December 2014.

4.11 Tendele is therefore a non-complying operator acting illegally.

LAND USE

4.12 The mining operation of Tendele is within the Municipal Jurisdiction of Fifth Respondent.

4.13 In terms of Section 33 of the Spatial Planning and Land Use Act, 2013 (SPLUMA) a land development application must be submitted to the relevant Municipal Council prior to any development of such property being

commenced with. This requirement is repeated in the KwaZulu-Natal Planning and Development Act (PDA).

- 4.14 The exercise of a mining right in terms of the MPRDA is subject to the provisions of SPLUMA and the PDA and therefore such right may only be exercised if a development application has been submitted and the zoning scheme in terms of SPLUMA and the PDA permits mining on the said land.

Maccsand (Pty) Ltd v City of Cape Town and Others 2012

(4) SA 181 (CC) at para [34] and [40] – [51]

- 4.15 This is because the Municipality is the exclusive authority in respect of municipal planning which includes land use. This was established by the Constitutional Court in

Johannesburg Metropolitan Municipality v Gauteng Development Tribunal

2010 (6) SA 182 (CC) at paras [49] to [57]

- 4.16 The failure by Tendele to obtain a land use permission in terms of SPLUMA or the PDA or in terms of the By Laws is an illegality and the mining of the land is taking place illegally.
- 4.17 These laws provide that the use of land must be permitted by the land scheme or town planning scheme otherwise it is illegal.

Papers : Founding Affidavit paras 64 – 85

GRAVES

4.18 Section 35 of the KwaZulu-Natal Heritage Act 4 of 2008 requires permission (written) to alter or move graves.

4.19 Graves have been altered and moved without permission.

4.20 This conduct on the part of Tendele is therefore illegal.

WASTE

4.21 Tendele has no waste management licence issued by the Minister of Environmental Affairs (Fourth Respondent) in terms of Section 43 (1) or the Minister of Minerals and Energy in terms of Section 43 (IA) of the National Environmental Management : Waste Act 9 of 2008) ("the Waste Act") despite requiring a licence by reason of its activities.

4.22 The expansion of its activities and the new mining permits require a Waste licence. A waste licence is required for open cast mining of coal.

4.23 Tendele admits that it has no licence.

4.24 The Report of Bosman (R4 at pages 447 – 456) and the evidence of acid mine drainage is evidence of the necessity for a waste licence.

5. INTERDICT REQUIREMENTS

5.1 The requisites for an interim interdict are well established in our law.

Setlogelo v Setlogelo 1914 AD 221 227

**Eriksen Motors (Welkom) Ltd v Protea Motors Warrenton
1973 (3) SA 685 at pages 691 C- F**

Olympic Passenger Service (Pty) Ltd v Ramlagan 1957 (2) SA 382 (D)

Ladychin Investments v SANRAL 2001 (3) SA 344 (N) at 353 D – 354 D

5.2 The applicants seek to interdict the mining operations of First Respondent on the basis that it is currently operating unlawfully as it does not possess the requisite Environmental Authorisation and other permits, approvals or licences.

5.3 If the interdict is of a permanent nature the essentials are set out in

Pilane v Pilane 2013 (4) SA 431 (CC) at [36] to [39]

5.4 What Applicants seek is an interdict to prevent Tendele from conducting itself illegally pending compliance and a return to the High Court. In other words an interdict until Tendele satisfies the Court that it is compliant. This

is temporary in nature and effect. These are referred to as "structural interdicts."

5.3 The Applicants therefore seek relief from the Honourable Court to exercise its wide ranging powers, which include the granting of supervisory orders in the form of a structural interdict. The interdict is not final but allows for the court to exercise its supervisory role in ensuring legislative compliance on the part of Tendele.

Minister of Health and others v Treatment Action Campaign and others (No. 2) 2002 (5) SA 721 (CC), para [113]; Head of Department, Mpumalanga Department of Education and Another v Hoërskool Ermelo and Another 2010 (2) SA 415 (CC), para [97];

6. CONCLUSION

The Applicants therefore submit that a case has been made out for the relief and prays for the relief as set out in the Notice of Motion.

7. AMICI CURIAE

7.1 There are three bundles of papers connected with an Amicus Curiae application to be allowed to make submissions in terms of Rule 16A. These are headed :

Amicus Curiae Bundle

Applicants' Amicus Curiae Bundle Vol 1

Applicants' Amicus Curiae Bundle Vol 2

7.2 Rule 16A allows amicus curiae (literally a friend of the Court) to ask the other parties for consent and to obtain permission from the Court to make submissions which are different to those of the other parties. Ideally an amicus curiae should not produce new contentious facts and should restrict itself to making novel submissions. They are supposed to be making submissions in the public interest which would not otherwise be made by the parties to the suit. In this it has a special duty to the Court. If the amicus wishes to introduce factual material this will only be admitted if it is in the interests of justice.

Children's Institute v Presiding Officer, Krugersdorp 2013

(2) SA 620 (CC) at paras [19] to [34]

7.3 Applicants' position is that they consent to the admission of the amici on the following basis :-

7.3.1 That they are only allowed to make submissions which will assist the Court and are different from those of the other parties;

7.3.2 That the facts that they have put up should be struck out or taken together with the reports filed by Applicants which rebut those facts;

7.3.3 That they are precluded from making self-serving submissions which are the same as the submissions made by Tendele in paragraphs 130 – 133 of Du Preez Affidavit at pages 217 – 219.

7.4 The Amici are in the premises Tendele in disguise. They are the entities referred to in the reference in Du Preez Affidavit above.

7.5 If they are entertained the further information must also be taken into account being :-

7.5.1 Second Applicant has 2528 members;

7.5.2. The Actionaid Social Audit shows that the advantages to the community are illusory;

7.5.3 The Edelstein Psycho-Social Report shows that the interference with the homes and habitat of the local people is irreparably harming and destructive.

Papers : Amicus Bundle Vol 1 : pages 29 – 56

7.5.4 The South African Human Rights Commission Report is indicative of the inequality of favouring the State and mining interests to the detriment of local communities.

Papers : Amicus Bundle Vol 2 : pages 1 - 99

7.6 When all is said and done this application is about the failure of Tendele to comply with the statutory protections of the environment. This illegality cannot be condoned on the grounds of its perceived benefits. Any attempt to do so should be regarded as irrelevant or rejected.

DATED at PIETERMARITZBURG this 8th day of AUGUST 2018.

A.J. DICKSON SC

M. MAZIBUKO

2018/Tendele/Applicants Heads of Argument

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AMAFA aKWAZULU-NATALI HERITAGE COUNCIL	NINTH RESPONDENT

APPLICANTS' CONCISE HEADS OF ARGUMENT

1.

1.1 Applicant seeks an order interdicting and restraining the First Respondent from continuing with any mining operations at the Tendele Coal mine in Somkhele, near the iMfolozi Game Reserve in Northern KwaZulu-Natal.

1.2 Such order is sought pending any further order of this court.

LOCUS STANDI

2.

2.1. The Applicants bring the applications in terms of section 24 and rely on the provisions of section 38 of Constitution of the Republic of South Africa, 1996.

2.2. Section 24(a) provides that everyone has a right to an environment that is not harmful to their health or well-being, the Applicants' interests herein are premised on this right, which is contained in the Bill of Rights.

2.3. Section 38 confers rights on the categories of persons listed therein, to approach the court where there is an alleged violation of constitutional rights, or threat thereof. It has a broad approach to legal standing and therefore extends beyond the general category of person who may approach the court seeking relief.

Ferreira v Levin NO and others; Vryenhoek and others v Powell NO and others 1996 (1) SA 984 (CC), para [35] and [167]

STATUTORY FRAMEWORK

3.

The mining rights held by First Respondent were respectively obtained on the following dates, June 2007, March 2011, March 2013, October 2016.

NEMA and MPRDA

4.

4.1. Section 24(1) read with Section 24(2)(a) and (b) and Section 24F of the National Environmental Management Act 1998 (NEMA), provides that no person may commence with any Environmental Impact Assessment listed activity, ***without a requisite Environmental Authorisation***. Commencement with any listed activity would therefore constitute unlawful conduct.

- 4.2. Though mining only became a listed activity following the NEMA amendments which came into effect in December 2014, the First Respondent would have had to execute a number of listed activities pursuant to engaging in mining operations, these would include the following listed activities, amongst a list of others:
 - 4.2.1. The construction of facilities or infrastructure for the storage of coal;
 - 4.2.2. The construction of facilities or infrastructure for the storage of hazardous waste;
 - 4.2.3. The construction of facilities or infrastructure for the off-stream storage of water, including dams and reservoirs;
- 4.3. The environmental authorisation pertains to the activity rather than the development, mining in this case and therefore, Section 24 of NEMA requires an environmental authorisation to be obtained **for each activity** prior to its commencement.

Joint Owners of Remainder Erf 5216 Hartenbos v Minister for Local Government, Environmental Affairs & Development Planning, Western Cape Province & another 2011(1) SA 128 WCC; para [36]

- 4.4. Applicant contends that First Respondent commenced with listed activities at the mine without obtaining the requisite environmental authorisation.
- 4.5. Prior to the 2014 amendment, First Respondent would have been obliged to obtain an environmental authorisation from both the Minister of Environmental Affairs in terms of Section 24 of NEMA and from the Minister of Mineral Resources, in terms of the then Section 38 of the Mineral and Petroleum Resources Development Act, 2002 (**MPRDA**) read with Section 24 of NEMA.

Mineral Sands Resources (Pty) Ltd v Magistrate for the District of Vredendal, Kroutz NO and Others [2017] 2 All SA 599 (WCC); para [17]

4.6. The NEMA amendment Act of 2014, did not extinguish the requirement for an environmental authorisation in terms section 24 and section 24F, however only stipulates that the Minister of Mineral Resources shall hence forth be the competent authority where the listed activity relates to mining and prospecting related activities. Therefore First Respondent still requires to obtain an environmental authorisation however following the 2014 NEMA amendment, shall only need to approach the Minister of Mineral Resources for such.

Mineral Sands Resources (Pty) Ltd v Magistrate for the District of Vredendal, Kroutz NO and Others [2017] 2 All SA 599 (WCC); para [22]

LAND USE AND OTHER STATUTES

5.

The non-compliance in other respects under other statutes is dealt with in the founding affidavit and the Main Heads of Argument.

INTERDICT REQUIREMENTS

6.

6.1. The requisites for an interdict are well established in our law.

Interim Interdict :

**Ladychin Investments v SANRAL 2001 (3) SA 344 (N) at 353 D – 354 D
2001 (3) SA 344 (N) at 353 D – 354 D**

Final Interdict :

Pilane v Pilane 2013 (4) SA 431 (CC) at paras [36] to [39]

6.2. The applicants seek to interdict the mining operations of First Respondent on the basis that it is currently operating unlawfully as it does not possess the

requisite Environmental Authorisation and permission or approval under other relevant statutes.

6.3. The Applicants seek relief from the Honourable Court to exercise its wide ranging powers, which include the granting of supervisory orders in the form of a structural interdict. The interdict is not final but allows for the court to exercise its supervisory role in ensuring legislative compliance on the part of First Respondent.

Minister of Health and others v Treatment Action Campaign and others
(No. 2) 2002 (5) SA 721 (CC), para [113]

CONCLUSION

7.

The Applicants therefore submit that a case has been made out for the relief and prays for the relief as set out in the Notice of Motion.

DATED at PIETERMARITZBURG this 8th day of AUGUST 2018.

A.J. DICKSON SC
M. MAZIBUKO

APPLICANTS' COUNSEL

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EZEMVELO KZN WILDLIF	EIGHTH
RESPONDENT	



AMAFA aKWAZULU-NATALI HERITAGE COUNCIL **NINTH**
RESPONDENT

APPLICANTS' PRACTICE NOTE

1. THE NAME AND NUMBER OF THE MATTER

As above.

2. NATURE OF THE RELIEF SOUGHT

The relief sought by the Applicants is as follows:

2.1. Interdicting and restraining the First Respondent from carrying on any mining operations at the following sites –

2.1.1. Area 1 on Reserve No. 3 (Somkele No. 15822 measuring 660.5321 hectares as described in the mining right dated 22 June 2007; and/or

2.1.2. Area 2 and 3 on Reserve No. 3 (Somkele No. 15822 measuring 779.8719 hectares as described in the mining right dated 30 March 2011; and/or

2.1.3. Areas Kwaqubuka and Luhlanga on Reserve No. 3, No.

15822 measuring 706.0166 hectares as described in the amendment of mining right dated 8 March 2013; and/or

2.1.4. One part of the remainder of Reserve No. 3, No. 15822 in extent 21233.0525 hectares described in the mining right dated 26 October 2016

until further order of this Honourable Court.

2.2. The Applicants further seek an order as to costs paid jointly and severally by any Respondent who opposes the application.

2.3. The matter is opposed by the First Respondent.

3. THE ISSUE OR ISSUES THAT REQUIRE DETERMINATION

3.1. Whether First Respondent is required to obtain an environmental authorisation as contemplated in Section 24 of NEMA prior to commencing with operations and if so, whether statute permits the continuation of mining operations pending compliance with legislation;

3.2. Whether the provisions of the KwaZulu-Natal Planning and Development Act 6 of 2008, the Special Planning and Land Use

Management Act 16 of 2013 and the provisions of the Mtubatuba SPLUMA bylaws of January 2017 are applicable to the First Respondent and if so –

3.2.1. Whether submitted a land use application to the Fifth and/or the Sixth Respondent and whether it received the requisite authority to use and develop the property as contemplated in the PDA;

3.2.2. Whether the First Respondent has complied with the provisions of SLUMPA particularly Section 26 read with schedule 2;

3.2.3. Whether the First Respondent has complied with the provisions of the SPLUMA bylaws of the Fifth Respondent.

3.3. Whether the provisions of the KwaZulu-Natal Heritage Act 4 of 2008 is applicable to the First Respondent and if so, whether the First Respondent has complied thereto especially Section 35 thereof.

3.4. Whether the provisions of the National Environment Management: Waste Act 59 of 2008 are applicable to the First Respondent and if so whether the First Respondent has complied thereto and more specifically sections 19 and 20 read with schedule 3 thereof.

- 3.5. Whether the provisions of the above mentioned statutes make provision for the continuation of mining operations pending the compliance of the First Respondent.
- 3.6. Whether and in what respect the Amici Curiae should be allowed to make representations.

4. THE INCIDENCE OF ONUS OF PROOF

The Applicant bears the onus to prove the applicability of the above mentioned statutory requirements upon the First Respondent and where the First Respondent alleges compliance thereof it shall bear onus of proof thereon.

5. BRIEF SUMMARY OF FACTS THAT ARE COMMON CAUSE OR NOT IN DISPUTE

- 5.1. The names and the descriptions of the parties.
- 5.2. The name, location, description and extent of the mine operated by the First Respondent.

- 5.3. That First Respondent does not have an environmental authorisation in terms of NEMA.
- 5.4. That the First Respondent did not make a Land Use Application and did not receive a positive judgment in terms of the PDA, SPLUMA and the Fifth Respondent's Municipal bylaws.
- 5.5. That the First Respondent does not have a waste management licence pertaining to its activity as an open cast coal mine.
- 5.6. That the First Respondent has previously removed and altered traditional graves without permission.

6. WHETHER ANY MATERIAL DISPUTES OF FACT EXIST AND A LIST OF SUCH DISPUTES

There are no material disputes of fact on the compliance issues. All disputes of fact are not material.

7. A LIST REFLECTING THAT PART OF THE PAPERS WHICH IN THE OPINION OF COUNSEL ARE NECESSARY FOR THE DETERMINATION OF THE MATTER

All the papers filed of record under case number 11488/17P are necessary for the determination of this matter.

8. A BRIEF SUMMARY OF THE ARGUMENT

- 8.1. The Applicants contend that the environmental authorisations were a requirement necessitating compliance and that the subsequent amendments to NEMA and the MPRDA do not alter the pre-existing obligation for the First Respondent to obtain an environmental authorisation.
- 8.2. That the provisions of the PDA and SPLUMA and the Fifth Respondent's municipal bylaws are applicable to the First Respondent and more importantly prior to embarking on the mining activity the First Respondent was required to obtain the requisite land use authorisation from the Fifth alternatively the Sixth Respondent and has not done so.
- 8.3. That the removal and/or altering of traditional graves could only have been embarked upon in terms of Section 35 of the KwaZulu-Natal Heritage Act however the First Respondent has not done so.
- 8.4. That the First Respondent has failed to comply with the provisions of the Waste Management Act which are applicable to the activities conducted by the First Respondent at the Somkele Mine.
- 8.5. That the Applicants are entitled to institute the present proceedings against the First Respondent that they have the requisite standing in terms of Section 24 and Section 38 of the Constitution.

9. A LIST OF AUTHORITIES TO WHICH PARTICULAR REFERENCE WILL BE MADE

- 9.1. National Environmental Management Act 107 of 1998.
- 9.2. Mineral and Petroleum Resources Development Act 28 of 2002.
- 9.3. The KwaZulu-Natal Heritage Act 4 of 2008.
- 9.4. National Environmental Management: Waste Act 59 of 2008.
- 9.5. Environmental Conservation Act 73 of 1989 (repealed).
- 9.6. National Environmental Management Laws Amendment Act of 2014.
- 9.7. National Environmental Management Act Regulations.
- 9.8. KwaZulu-Natal Planning and Development Act 6 of 2008.
- 9.9. Spatial Planning and Land Use Management Act 16 of 2013.
- 9.10. The Mtubatuba SPLUMA bylaws of January 2017.
- 9.11. Ferreira v Levin NO and others; Vryenhoek and others v Powell NO and others 1996 (1) SA 984 (CC).
- 9.12. Ngxuza and Others v Permanent Secretary, Department of Welfare, Eastern Cape, and Another 2001 (2) SA 609 (E).
- 9.13. Permanent Secretary, Dept of Welfare, Eastern Cape Provincial Government and Another v Ngxuza and Others 2001 (4) SA 1184 (SCA).
- 9.14. Joint Owners of Remainder Erf 5216 Hartenbos v Minister for Local Government, Environmental Affairs & Development

Planning, Western Cape Province & another 2011(1) SA 128 WCC.

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

9.16. Maccsand (Pty) Ltd v City of Cape Town and Others (Chamber of Mines of South Africa and Another as Amici Curiae) 2012 (7) BCLR 690 (CC).

9.17. Setlogelo v Setlogelo 1914 AD 221 227.

9.18. Eriksen Motors (Welkom) Ltd v Protea Motors Warrenton 1973 (3) SA 685 (A).

9.19. Olympic Passenger Service (Pty) Ltd v Ramlagan 1957 (2) SA 382 (D).

9.20. Minister of Health and others v Treatment Action Campaign and others (No. 2) 2002 (5) SA 721 (CC).

9.21. Head of Department, Mpumalanga Department of Education and Another v Hoërskool Ermelo and Another 2010 (2) SA 415 (CC).

9.22. HTF Developers v Minister of Environmental Affairs 20016 (5) SA 512 (T).

9.23. Department of Agriculture Conservation and the Environment v HTF Developers 2008 (2) SA 319 (CC).

9.24. Fuel Retailers Association v D-G, Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province 2007 (6) SA 4 (CC)

9.25. Giant Concerts CC v Rinaldo Investments (Pty) Ltd 2013 (3) BCLR 251 (CC).

- 9.26. Johannesburg Metropolitan Municipality v Gauteng Development Tribunal 2010 (6) SA 182 (CC).
- 9.27. Ladychin Investments v SANRAL 2001 (3) SA 344 (N).
- 9.28. Children's Institute v Presiding Officer, Krugersdorp 2013 (2) SA 620 (CC).

10. CHRONOLOGY

Attached.

SIGNED at PIETERMARITZBURG on the 8th day of AUGUST 2018.

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APPLICANTS' COUNSEL

2018/Tendele/Practice Note

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

CASE NO.: 11488/17P

In the matter between:

GLOBAL ENVIRONMENTAL TRUST	FIRST APPLICANT
MFOLOZI COMMUNITY ENVIRONMENTAL JUSTICE ORGANISATION	SECOND APPLICANT
SABELO DUMISANI DLADLA	THIRD APPLICANT
and	<p>ARIFFIER VAN DIE HOOGGEREGSHOF VAN S.A. NATALSE PROVINSIALE AFDÉLING PRIVAATSAK/PRIVATE BAG X9014 2018 -08- 08 PIETERMARITZBURG, 3200 NATAL PROVINCIAL DIVISION REGISTRAR OF THE HIGH COURT OF S.A.</p>
TENDELE COAL MINING (PTY) LTD	FIRST RESPONDENT
MINISTER OF MINERALS AND ENERGY	SECOND RESPONDENT
MEC: DEPARTMENT OF ECONOMIC DEVELOPMENT , TOURISM AND ENVIRONMENTAL AFFAIRS	THIRD RESPONDENT
MINISTER OF ENVIRONMENTAL AFFAIRS	FOURTH RESPONDENT
MTUBATUBA MUNICIPALITY	FIFTH RESPONDENT
HLABISA MUNICIPALITY	SIXTH RESPONDENT
INGONYAMA TRUST	SEVENTH RESPONDENT
EZEMVELO KZN WILDLIFE	EIGHTH RESPONDENT
AMAFa aKWAZULU-NATALI HERITAGE COUNCIL	NINTH RESPONDENT

CHRONOLOGY

1. 1999 The National Environmental Management Act 107 of 1998 (NEMA), commencement date 29 January 1999.
2. 2004 The Mineral and Petroleum Resources Development Act, 2002, commencement date 1 May 2004.
3. 2007 First Respondent granted mining right dated **22 June 2007** in terms of Section 23 of the MPRDA in respect of coal mining for Area 1 on Reserve no 3 (Somkele) no. 15822 measuring 660.5321 hectares.
4. 2008 18th January 2008, local government demarcations changed by the Municipal Demarcation Board by notice in terms of Section 21 of the Local Government: Municipal Demarcation Act 27 of 1998. Pertaining to mining area under Hl bisa Local Municipality.
5. 2008 The KwaZulu-Natal Heritage Act 4 of 2008, commencement date, **12 February 2009**.
6. 2009 The National Environment Management Amendment Act, 62 of 2008. ("NEMAA"), commencement date, **9 May 2009**.

The National Environmental Management: Waste Act 59 of 2008 (Waste Act), Commencement date, **1 July 2009**.

7. 2010 The KwaZulu-Natal Planning and Development Act 6 of 2008 (PDA), commencement date, **1 May 2010**.

8. 2011 First Respondent's mining right for Area 2 and 3 on Reserve no. 3 (Somkele) no. 15822 measuring 779.8719 hectares, converted in terms of item number 7 of schedule 2 of the MPRDA in respect of coal mining. Converted mining right dated **13 March 2011**.

16 May 2011, boundaries between the Hlabisa Local Municipality and the Mtubatuba Municipality changed, area 3 of the mine thereafter fell under Mtubatuba.

9. 2013 Amendment of First Respondent's mining right dated **8 March 2013** converted in terms of Section 102 of the NPRDA in respect of coal mining for Areas of Kwaqubuka and Luhlanga areas on Reserve no. 3 no. 15822 measuring 706.0166 hectares.

9 May 2013, Third Applicant's father delivered letters of complaint and concern to Department of Minerals about First Respondent's mining operations.

10. 2014 NEMA EIA Regulations ("EIA Regulations 2014") and listing notices were published on **4 December 2014**.

The National Environmental Management Laws Amendment Act,

2014 (“NELMA”), commencement date, **8 December 2014**.

Sabelo Dlamini loses cattle during mining operations near his home.

11. 2015 The Spatial Planning and Land Use Management Act 16 of 2013 (SPLUMA), commencement date 1 July 2015.

12. 2016 First Respondent granted mining right for one part of the remainder of Reserve no. 3 no. 15822 in extent 21233.0525 hectares granted in terms of Section 23 of the NPRDA dated **26 October 2016**, in respect of coal mining.

First Respondent sank 4 to 5 boreholes along the Mfolozi River.

13. 2017 NEMA EIA Regulations 2014, amended in terms of Government Notice 326 in Government Gazette 40772 dated 7 April 2017.