IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL DIVISION, PIETERMARITZBURG

CASE NO: 11488/17P

In the matter between:

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

and

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

Coram: Seegobin J

ORDER

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

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

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

JUDGMENT ON APPLICATION FOR LEAVE TO APPEAL

Seegobin J

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

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

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

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

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

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

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

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

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

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

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

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

Order

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

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

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

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

Seegobin J

APPEARANCES:

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