THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable/Not reportable

Case No: 1105/2019

In the matter between:

GLOBAL ENVIRONMENTAL TRUST	**FIRST APPELLANT**
MFOLOZI COMMUNITY ENVIRONMENTAL JUSTICE ORGANISATION	**SECOND APPELLANT**
SABELO DUMISANI DLADLA	**THIRD APPELLANT**
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 MINICIPALITY	**SIXTH RESPONDENT**
INGONYAMA TRUST	**SEVENTH RESPONDENT**
EZEMVELO KZN WILDLIFE	**EIGHTH RESPONDENT**
AMAFA AKWAZULU-NATALI HERITAGE COUNCIL	**NINTH RESPONDENT**
CENTRE FOR ENVIRONMENTAL RIGHTS	**AMICUS CURIAE**

MPUKUNYONI TRADITIONAL COUNCIL **AMICUS CURIAE**

MPUKUNYONI COMMUNITY MINING FORUM **AMICUS CURIAE**

THE ASSOCIATION OF MINE WORKERS AND CONSTRUCTION UNION **AMICUS CURIAE**

THE NATIONAL UNION OF MINEWORKERS **AMICUS CURIAE**

Neutral citation: *Global Environmental Trust and Others v Tendele Coal Mining (Pty) Ltd and Others* (1105/2019) [2021] ZASCA 13 (09 February 2021)

Coram: PONNAN, SCHIPPERS, PLASKET AND NICHOLLS JJA AND LEDWABA AJA

Heard: 03 November 2020

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email. It has been published on the Supreme Court of Appeal website and released to SAFLII. The date and time of hand-down is deemed to be 10H00 on 09 February 2021.

Summary: Interdict to stop coal mining **–** interpretation of statutes – National Environmental Management Act 107 of 1998 (NEMA) – environmental authorisation to undertake listed activity under s 24 – whether required by holder of mining right and environmental management programme in terms of the Mineral and Petroleum Resources Development Act 28 of 2002 – no case made out for interdict in founding papers – municipal approval of land use – Spatial Planning and Land Use Management Act 16 of 2013, KwaZulu-Natal Planning and Development Act 6 of 2008 and Mtubatuba Local Municipality Spatial Planning and Land Use Management By-Law, 2017 – not required by virtue of transitional arrangements – National Environmental Management Waste Act 59 of 2008 – waste management licence not required by reason of transitional

provision – non-compliance with the KwaZulu-Natal Heritage Act 4 of 2008 – relocation of ancestral graves – no reasonable apprehension of harm – interdict refused.

ORDER

On appeal from: KwaZulu-Natal Division of the High Court, Pietermaritzburg (Seegobin J sitting as court of first instance): judgment reported *sub nom Global Environmental Trust and Others v Tendele Coal Mining (Pty) Ltd and Others* [2019] 1 All SA 176 (KZP).

The appeal is dismissed.

JUDGMENT

Schippers JA:

[1] The central issue in this appeal is whether the first respondent, Tendele Coal Mining (Pty) Ltd (Tendele), is mining without the necessary statutory authorisations and approvals. The matter arises from an unsuccessful application by the appellants in the KwaZulu-Natal Division of the High Court, Pietermaritzburg (the high court), to interdict Tendele from continuing with any mining operations at its Somkhele Mine in Mtubatuba, KwaZulu-Natal (the mine). The appeal is with the leave of the high court.

[2] The first appellant is Global Environmental Trust, established inter alia to preserve the planet and its natural resources. The second appellant, Mfolozi Community Environmental Justice Organisation, is a not-for-profit organisation,

whose objects include the implementation of environmentally sustainable projects for the Fuleni community in northern KwaZulu-Natal (KZN). The third appellant and main deponent to the founding papers, Mr Sabelo Dumisani Dladla, an Eco-tourism Management student who lives in Nlolokotho, near the mine, withdrew from this appeal on 29 October 2020. Tendele consented to the withdrawal of the appeal and seeks no order for costs. In what follows I refer to the first and second appellants as 'the appellants'.

[3] The *amici curiae* represented in the appeal are the Centre for Environmental Rights (CER) and as a group, Mpukunyoni Traditional Council, Mpukunyoni Community Mining Forum, the Association of Mine Workers and Construction Union and the National Union of Mineworkers (the Mpukunyoni *amici*). The CER, in its written and oral submissions, contended that the high court erred in its interpretation of the relevant statutory provisions, and in ordering the appellants to pay Tendele's costs. The Mpukunyoni *amici* submitted that the orders sought by the appellants, if granted, would ultimately lead to the closure of the mine which, in turn, would have disastrous effects on neighbouring communities.

Facts

[4] The basic facts can be shortly stated. The mine has one of the largest resources of open-pit mineable anthracite reserves in South Africa and is the principal supplier of anthracite to ferrochrome producers in the country. Ferrochrome is an essential component in the production of stainless steel. South Africa is one of the largest producers of ferrochrome in the world, second only to China. Tendele began mining operations in 2006 pursuant to the grant of an 'old order' mining licence and subsequently a mining right, and the approval of an Environmental Management Programme (EMP) under the Mineral and Petroleum Resources Development Act 28 of 2002 (MPRDA).

[5] The mine comprises a single mining area on Reserve No 3 (Somkhele) No 15822 (Reserve No 3). However, the mining operations are divided between five areas and separate mining rights and separate EMPs apply to the different areas. The Area 1 mining right was granted to Tendele on 21 May 2007 and the EMP applicable to that mining right, approved on 22 June 2007 by the former Department of Mineral Resources (DMR). The Areas 2 and 3 converted mining right was granted to Tendele on 1 February 2011. On 8 March 2013 this right was amended to include the KwaQubuka and Luhlanga areas. The EMP applicable to the Areas 2 and 3 converted mining right was approved on 30 March 2011. Amendments to this EMP to cater for the inclusion of the KwaQubuka and Luhlanga areas, were approved on 29 May 2012. The mining right in respect of Areas 4 and 5 was granted on 31 May 2016. The EMP applicable to this right was approved on 26 October 2016.

[6] Tendele is actively mining only in Area 1 and the extended area of Area 2, namely the KwaQubuka and Luhlanga areas. The mine's coal wash plants are located in Area 2. No mining operations are conducted in Area 3. Mining in Area 2 ceased in January 2012 due to depletion of anthracite reserves. Mining operations have not commenced in Areas 4 and 5.

[7] In October 2017 the appellants sought an interdict to prevent Tendele from carrying on with any mining operations in the following areas: Area 1 as described in the mining right dated 22 June 2007; Areas 2 and 3 described in the mining right dated 30 March 2011; the KwaQubuka and Luhlanga areas described in an amendment to the mining right dated 8 March 2013; and a part of the Remainder of Reserve No 3 No 15822, in extent 21 233.0525 hectares, described in the mining right dated 26 October 2016.

[8] The interdict was sought on the basis that Tendele was 'non-compliant in respect of the permits or approvals required' in relation to mining, environmental authorisation, land use, interference with graves and waste management. More specifically, the appellants alleged that Tendele has no environmental authorisation issued in terms of s 24(2) of the National Environmental Management Act 107 of 1998 (NEMA) to conduct mining operations. Tendele has no authority, approval or permission from a municipality to use land for mining operations. Tendele has no written approval in terms of s 35 of the KwaZulu-Natal Heritage Act 4 of 2008 (the KZN Heritage Act) to damage, alter or exhume traditional graves. Tendele does not have a waste management licence issued by the fourth respondent, the Minister of Environmental Affairs (the Environment Minister), under s 43(1) of the National Environmental Management: Waste Act 9 of 2008 (the Waste Act), or by the second respondent, the Minister of Minerals and Energy (the Mining Minister), in terms of s 43(1A) of the Waste Act.

[9] Tendele opposed the application for an interdict, essentially on the following grounds. Tendele's mining operations are undertaken in terms of valid mining rights and EMPs under the MPRDA. The legislative amendments introduced with effect from 8 December 2014, that gave effect to the so-called 'One Environmental System', in terms of which the holder of a mining right is required to have environmental authorisation for its operations, contain transitional arrangements for the continuation of mining operations lawfully conducted prior to those amendments. In terms of the One Environmental System, all the environmental aspects of mining are regulated through NEMA and all environmental provisions are repealed from the MPRDA.[1] The mine operates

[1] *Minister of Mineral Resources v Stern and Others; Treasure the Karoo Action Group and Another v Department of Mineral Resources and Others* [2019] ZASCA 99; [2019] 3 All SA 684 (SCA) para 21. The One Environmental System is expressly recognised in s 50A(2) of NEMA, which provides:

lawfully, in compliance with the relevant land-use planning laws. The waste management activities by Tendele are authorised in terms of the transitional provisions of the Waste Act, which provide for the continuation of such activities lawfully undertaken prior to the amendment on 29 November 2013, of the list of waste management activities that have a detrimental effect on the environment.

[10] Tendele accepted that it had previously removed or altered traditional graves without the necessary authorisation, but asserted that it did so after consultation with the families concerned. Since 2017 it has been working in collaboration with the ninth respondent, AMAFA aKwaZulu-Natali Heritage Council (AMAFA Heritage Council), and a comprehensive procedure for future relocation of graves has been established.

[11] The high court (Seegobin J) dismissed the application with costs. Its main findings may be summarised as follows. The appellants failed to establish a proper cause of action: they did not identify precisely the activities undertaken by Tendele without the necessary environmental authorisation. Prior to the coming into force of the One Environmental System on 8 December 2014, the environmental impacts of mining were regulated exclusively under the MPRDA in terms of approved EMPs. Section 12(4) of the National Environmental Management Amendment Act 62 of 2008 (the 2008 NEMA Amendment Act),

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'Agreement for the purpose of subsection (1) means the agreement reached between the [Environment] Minister, the Minister responsible for water affairs and the Minister responsible for mineral resources titled ***One Environmental System*** for the country with respect to mining, which entails–

(a) that all environment -related aspects would be regulated through one environmental system which is the principal Act [NEMA] and that all environmental provisions would be repealed from the Mineral and Petroleum Resources Development Act, 2002;

(b) that the Minister sets the regulatory framework and norms and standards, and that the Minister responsible for Mineral Resources will implement provisions of the principal Act and the subordinate legislation as far as it relates to prospecting, exploration, mining or operations;

(c) that the Minister responsible for Mineral Resources will issue environmental authorisations in terms of the principal Act for prospecting, exploration, mining or operations, and that the Minister will be the appeal authority for these authorisations; and

(d) that the Minister, the Minister responsible for Mineral Resources and the Minister responsible for Water Affairs agree on fixed time-frames for the consideration and issuing of the authorisations in their respective legislation and agreed to synchronise the time-frames.'

which provides that an EMP approved under the MPRDA must be regarded as having been approved in terms of NEMA, has the status of an environmental authorisation under NEMA. The purpose of this transitional provision was to allow the holder of an EMP lawfully conducting mining operations as at 8 December 2014, to continue to do so after that date. This interpretation is supported by the presumption against the retrospective operation of statutes.

[12] The high the court concluded that the Mining Minister was satisfied with Tendele's EMPs and the manner in which it conducted its mining operations, because no action had been taken against Tendele in terms of s 12(5) of the 2008 NEMA Amendment Act. This provision states that if the Mining Minister is of the opinion that mining operations are likely to result in unacceptable pollution, ecological degradation or damage to the environment, the Minister may direct the holder of a mining right to take action to upgrade an EMP to address the deficiencies. In terms of s 24L(4) of NEMA, a competent authority empowered under Chapter 5 to issue an environmental authorisation (the Mining Minister), may regard 'an authorisation in terms of any other legislation' that meets all the requirements stipulated in s 24(4), as an environmental authorisation in terms of Chapter 5. Tendele's EMPs constitute authorisations in terms of any other legislation.

[13] The high court held that the laws relating to land use, requiring authority, approval or permission from the relevant municipality, do not apply to Tendele, whose mining operations predate the coming into force of those laws. Tendele does not require a waste management licence under the Waste Act since it was lawfully conducting mining operations in terms of approved EMPs. The appellants were not entitled to an interdict, since they failed to establish a reasonable apprehension that Tendele would exhume or relocate traditional graves without the necessary statutory safeguards.

Environmental authorisation

[14] The issue on this part of the case, is whether Tendele requires, in addition to a mining right and an EMP in terms of the MPRDA, environmental authorisation under NEMA for activities incidental to mining, specified as 'listed activities' in the relevant environmental impact assessment (EIA) regulations. Section 24F(1)*(a)* of NEMA prohibits the commencement of 'listed activities' without environmental authorisation. Listed activities are those identified in terms of ss 24(2)*(a)* and 24(2)*(d)* of NEMA.

[15] Acting in terms of s 24(2)*(a)* of NEMA (and its predecessor, s 21 of the Environment Conservation Act 73 of 1989 (ECA)) the Environment Minister has identified numerous listed activities requiring environmental authorisation. Since the first list of activities was published on 5 September 1997 in terms of the ECA,[2] until the most recent list published on 4 December 2014 under NEMA,[3] there have been amendments and additions to, and removal and replacement of, listed activities in the EIA regulations.

No proper cause of action?

[16] The appellants alleged that normally, mining is a listed activity which has an impact on the environment and thus requires environmental authorisation in terms of NEMA. However, they did not identify the listed activities that Tendele allegedly commenced without environmental authorisation, nor the date on which those activities commenced. Counsel for Tendele submitted that this was fatal to

[2] 'The Identification under Section 21 of Activities which may have a Substantial Detrimental Effect on the Environment GN R1182, *GG* 18261, 5 September 1997' (as amended).
[3] 'List of Activities and Competent Authorities Identified in terms of Sections 24(2) and 24D GN R983, 984 and 985, *GG* 38282, 4 December 2014' (as amended).

their case, with the result that the issue as to the proper interpretation of the MPRDA and NEMA concerning an environmental authorisation contemplated in NEMA, did not arise on the founding papers. This submission is unsound, for the reasons advanced below.

[17] First, there is nothing in the answering affidavit that even suggests that the application should be dismissed because the appellants failed to state the listed activities conducted by Tendele without environmental authorisation. Neither did Tendele oppose the application on the basis that it was not engaged in any listed activity. Instead, Tendele's sole defence was that no environmental authorisation under NEMA was necessary because its mining operations were conducted in terms of its mining rights and EMPs issued under the MPRDA.

[18] What crystallised as the main issue between the parties, is easily explained in the light of the facts leading up to the application, set out in the founding affidavit. In June 2017 the appellants' attorney wrote to the DMR and the Department of Environmental Affairs (DEA), stating that Tendele was conducting activities listed in the EIA Regulations Listing Notices (no details were given), and requesting a copy of all environmental authorisations issued to Tendele, together with supporting documentation. The DMR replied that the EMPs issued under the MPRDA were deemed to be EMPs issued under NEMA, and that any environmental authorisations issued by the DEA was in the process of being transferred to the DMR for monitoring and compliance.

[19] It turned out that Tendele has no environmental authorisation in terms of NEMA to conduct any listed activity. Indeed, this is common ground. Its approach throughout was that it did not require environmental authorisation because the environmental impacts of mining were regulated exclusively by the MPRDA in terms of approved EMPs. In June 2017 Tendele issued a public

statement that according to the statutory framework that governed mining in South Africa, the ECA and NEMA did not apply to mining operations at the relevant time.

[20] The appellants therefore approached the high court, claiming that Tendele is mining unlawfully because it has no environmental authorisation in terms of s 24 of NEMA. Unsurprisingly, the founding affidavit states that this is 'common cause from the correspondence'; and the high court noted that whether Tendele was required to obtain environmental authorisation under s 24, was an issue for determination. The facts thus show that the appellants had no reason to anticipate any dispute as to whether Tendele's mining operations triggered any listed activity. This is buttressed by the fact that Tendele at no stage, raised such dispute. Had Tendele denied that its mining operations triggered any listed activities, the appellants could have dealt with such denial in their founding or replying papers.

[21] There was accordingly no dispute between the parties as to whether Tendele was conducting listed activities. Solely for these reasons, Tendele's argument has no merit: it is opportunistic and contrived. But even if there was any dispute of fact as to whether Tendele's mining operations included listed activities, it should be resolved against Tendele. As this Court stated in *Wightman*:[4]

'When the facts averred are such that the disputing party must necessarily possess knowledge of them and be able to provide an answer (or countervailing evidence) if they be not true or accurate but, instead of doing so, rests his case on a bare or ambiguous denial the court will generally have difficulty in finding that the test [for the resolution of factual disputes in motion proceedings] is satisfied . . . If that does not happen it should come as no surprise that the court takes a robust view of the matter.'

[4] *Wightman t/a J W Construction v Headfour (Pty) Ltd and Another* [2008] ZASCA 6; 2008 (3) SA 371 (SCA) para 13.

[22] Secondly, Seegobin J, dealing with environmental authorisations and listing notices prior to the amendments which came into effect on 8 December 2014, said this:

'It seems that prior to 8 December 2014 mining per se was not a listed activity, however anyone intending to embark on mining would of necessity have to perform certain activities which were listed activities (e.g. establishing infrastructure for bulk transportation of water; facilities for the storage of fuel; clearing indigenous vegetation covering more than 1 hectare, etc) and would therefore have required environmental authorisation for those activities in terms of s 24.'

[23] This is a dictum by Rogers J in *Mineral Sands Resources*,[5] which in my view is correct. Given that mining inevitably involves the performance of listed activities, the high court's criticism that the founding affidavit 'does not go far enough to establish a proper cause of action', is baffling.

[24] Thirdly, the inescapable inference to be drawn from the facts in the papers, and the nature and extent of Tendele's mining operations (according to the answering affidavit, 'Somkhele has one of the largest resources of open-pit mineable anthracite reserves in South Africa'), is that Tendele conducts listed activities as contemplated in the EIA listing notices. Open pit mining of necessity involves clearing indigenous vegetation covering more than one hectare. The answering affidavit states that Tendele has not yet commenced mining operations in Areas 4 and 5 – comprising 21 233 hectares (more than 200 km^2) and some ten times larger than the areas covered by the other mining rights combined.

[25] Further, Tendele conducts conventional truck and shovel mining operations using explosives, and it utilises water in bulk supply at its coal washing plants

[5] *Mineral Sands Resources (Pty) Ltd v Magistrate for the District of Vredendal, Kroutz NO and others* [2017] 2 All SA 599 (WCC) para 8.

located in Area 2. As stated in the affidavit of the Mpukunyoni *amici*, and as Tendele's main deponent, Mr Jan du Preez, must know, an investment for the establishment for a third wash plant, which would add an additional 400 000 tonnes of saleable energy product to the 1.2 million tonnes of anthracite produced per annum, has been approved. Environmental authorisation is required for the establishment of facilities for the storage of fuel; infrastructure for the bulk transportation of water; and buildings and structures for the storage of explosives.

[26] Finally, the question whether Tendele is mining unlawfully because it has no environmental authorisation in terms of s 24 of NEMA was squarely raised on the papers. This question is specifically relevant to the mining right granted to Tendele in 2016, which covers Areas 4 and 5 where mining has not yet commenced. The answering affidavit states that even after the introduction of the One Environmental System in 2014, which requires the holder of a mining right to obtain environmental authorisation under NEMA, this does not apply to Tendele whose mining operations remain lawful by virtue of transitional arrangements.

[27] For these reasons, I am unable to agree with the high court's criticism that the appellants failed 'to establish a proper cause of action on the issue of any illegality on the part of Tendele'. But quite apart from the pleadings issue, as rightly submitted by the CER, it is necessary for this Court to pronounce on the interpretive question for two reasons. First, the high court's order stands until it is set aside by this Court and is binding in KZN. This, as appears from *Mineral Sands Resources*,[6] gives rise to a divergence of interpretation of the relevant statutory provisions in the KZN Division and other Divisions in the country. Second, the absence of clarity and certainty concerning the correct interpretation

[6] *Mineral Sands* fn 5.

will potentially weaken the environmental protections sought to be achieved by s 24 of the Constitution and NEMA. This, in turn, would result in the flouting of environmental standards and undermine the rule of law.[7]

The MPRDA does not cover environmental impacts of mining

[28] As stated above, the high court accepted that prior to the commencement of the One Environment System on 8 December 2014, anyone intending to mine would of necessity undertake listed activities and require environmental authorisation in terms of s 24 of NEMA. Despite this, the court held that the decision to grant a mining right and approve a mining EMP, 'effectively constituted the environmental authorisation to conduct the mining activity'.

[29] Counsel for the appellants argued that the high court was wrong to hold that the environmental impacts of mining were regulated exclusively through the MPRDA and the requirement to obtain an EMP under that Act before commencing mining. The high court's interpretation, it was argued, collapses NEMA into the MPRDA, instead of allowing each statute to regulate environmental matters in tandem.

[30] Counsel for Tendele, however, submitted that the MPRDA was enacted to cover the field in relation to the environmental impacts and management of mining-related activities. The legislature, so it was submitted, made the implementation of the MPRDA subject to the principles in s 2 of NEMA, but left the interpretation thereof and decision-making in the hands of the functionaries of the DMR in accordance with the MPRDA and the regulations made under it.

[7] The rule of law, enshrined in s 1 of the Constitution, requires that legislation be enacted and publicised in a clear and accessible manner to enable people to regularise their conduct and affairs accordingly. A decision on the proper construction of NEMA is necessary for mines to regulate their conduct and affairs lawfully.

[31] Both the MPRDA and NEMA are statutes that give effect to the right to have the environment protected for the benefit of present and future generations, enshrined in s 24 of the Constitution.[8] It is a settled principle that courts are required to interpret statutes purposively, in conformity with the Constitution and in a manner that gives effect to the rights in the Bill of Rights.[9] In *Fuel Retailers*,[10] the Constitutional Court said:

'The role of the courts is especially important in the context of the protection of the environment and giving effect to the principle of sustainable development. The importance of the protection of the environment cannot be gainsaid. Its protection is vital to the enjoyment of the other rights contained in the Bill of Rights; indeed, it is vital to life itself.'

[32] The Constitutional Court has explained NEMA's structural and integrative role regarding the protection of the environment, as follows:

'NEMA was enacted as a general statute that coordinates environmental functions performed by organs of state. It also provides for "co-operative environmental governance by establishing principles for decision-making on matters affecting the environment". As is evident from the long title, NEMA was passed to establish a framework regulating the decisions taken by organs of state in respect of activities which may affect the environment. It lays down general principles which must be followed in making decisions of that nature.'[11]

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[8] *Maccsand (Pty) Ltd v City of Cape Town and Others* [2012] ZACC 7; 2012 (4) SA 181 (CC) para 8. Section 4 of the Mineral and Petroleum Resources Development Act 28 of 2002 (MPRDA) states that when construing its provisions, any reasonable interpretation consistent with its objects (which includes giving effect to s 24 the Constitution) must be preferred. Section 24 of the Constitution provides:

'**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.'

[9] *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others In re: Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others* 2001 (1) SA 545 (CC) para 23; *Independent Institute of Education (Pty) Ltd v KwaZulu-Natal Law Society and Others* [2019] ZACC 47; 2020 (2) SA 325 (CC) paras 1-2.

[10] *Fuel Retailers Association of Southern Africa v Director-General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province and Others* 2007 (6) SA 4 (CC) para 102.

[11] *Maccsand* fn 8 para 9, footnotes omitted.

[33] These mandatory principles, set out in s 2(1) of NEMA, must be applied when an organ of state takes any decision in terms of NEMA *or any statutory provision* concerning the protection of the environment, and guide the interpretation, administration and implementation of NEMA and any other law concerned with environmental protection or management.[12]

[34] Consistent with these principles, sustainable development and sustainable use and exploitation of natural resources are at the core of the protection of the environment. Thus, s 2(4)*(a)* of NEMA imposes sustainable development which requires that a 'risk-averse and cautious approach is applied' whereby 'negative impacts on the environment and on people's environmental rights be anticipated and prevented, and where they cannot be altogether prevented, are minimised and remedied'.[13] NEMA requires that the environment be protected by securing 'ecologically sustainable development and use of natural resources while promoting justifiable economic and social development'.[14]

[35] The integrative approach to the protection and management of the environment is emphasised in the language of NEMA itself. Section 2(4)*(b)* states:

'Environmental management must be integrated, acknowledging that all elements of the environment are linked and interrelated, and it must take into account the effects of decisions on all aspects of the environment and all people in the environment by pursuing the selection of the best practicable environmental option.'

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[12] Section 2(1) of NEMA provides:
'The principles set out in this section apply throughout the Republic to the actions of all organs of state that may significantly affect the environment and–
(a) . . .
(b) serve as the general framework within which environmental management and implementation plans must be formulated;
(c) serve as guidelines by reference to which any organ of state must exercise any function when taking any decision in terms of this Act or any statutory provision concerning the protection of the environment;
(d) . . .
(e) guide the interpretation, administration and implementation of this act, and any other law concerned with the protection or management of the environment.'

[13] Sections 2(4)*(a)*(vii) and 2(4)*(a)*(viii).

[14] Preamble to NEMA.

[36] As already stated, s 24(2)*(a)* of NEMA empowers the Environment Minister to identify 'activities which may not commence without environmental authorisation from the competent authority'. It must be stressed that s 24(2)*(a)* is not confined to activities that relate specifically to mining: once an activity has been listed in terms of that provision, environmental authorisation to conduct that activity must be obtained. Listed activities, as stated, include establishing infrastructure for the bulk transportation of water and facilities for the storage of fuel, and clearing indigenous vegetation.[15] So, nothing turns on the fact that listed activities specifically related to mining, identified by the Environment Minister in terms of s 24 of NEMA and published in the EIA Regulations of 21 April 2006, never came into force.[16]

[37] NEMA defines 'environmental authorisation', inter alia, as 'the authorisation by a competent authority of a listed activity or specified activity in terms of this Act'. It defines a 'competent authority' in respect of a listed activity as, 'the organ of state charged by this Act with evaluating the environmental impact of that activity and, where appropriate, with granting or refusing an environmental authorisation in respect of that activity'.

[38] Section 24F(1)*(a)* underscores the need for an environmental authorisation as a prerequisite for a listed activity. When Tendele's first EMP was approved in 2007, s 24F of NEMA provided:

'**24F Offences relating to commencement or continuation of listed activities**

(1) Notwithstanding any other Act, no person may–

[15] *Mineral Sands Resources* fn 5 para 8.

[16] 'List of Activities and Competent Authorities identified in terms of sections 24 and 24D of the National Environmental Management Act, 1998 GN R387, *GG* 28753, 21 April 2006', items 7 and 8 of the Schedule.

(a) commence an activity listed or specified in terms of s 24(2)*(a)* or *(b)* unless the competent authority or the Minister responsible for mineral resources, as the case may be, has granted an environmental authorisation for the activity. . . .'

[39] It is clear, simply from the above provisions of NEMA, that an environmental authorisation granted by a competent authority under NEMA is not the same thing as an EMP approved under the MPRDA. In *Minister of Mineral Resources v Stern* (to which we were not referred),[17] this Court assumed, without deciding, that an environmental authorisation under NEMA is essentially the same as an EMP. In my view, it is not. An environmental authorisation is required for the commencement of an activity identified in a listing notice. The impacts of listed activities on the environment are assessed in order 'to give effect to the general objectives of integrated environmental management' in Chapter 5 of NEMA,[18] which lays down rigorous processes for that assessment.

[40] Further, NEMA defines an 'environmental management programme' (a NEMA EMP) as meaning 'a programme required in terms of section 24'.[19] Section 24N provides that the competent authority 'may require the submission of an environmental management programme before considering an application for an environmental authorisation'. The main function of a NEMA EMP is to set out the proposed management, mitigation, protection and remedial measures that will be undertaken to address the environmental impacts of listed activities. It is not the function of a NEMA EMP to determine the activities which an applicant is authorised to undertake.[20]

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[17] *Minister of Mineral Resources v Stern and Others* fn 1 paras 44-45.
[18] Section 24(1) of NEMA.
[19] Section 1 of NEMA. This definition was inserted by s 1*(g)* of the National Environmental Management Amendment Act 62 of 2008.
[20] *Mineral Sands Resources* fn 5 para 170.

[41] By contrast, an EMP under the MPRDA is unrelated to a listed activity envisaged in s 24(2)*(a)* of NEMA. The MPRDA defined an EMP as 'an approved environmental management programme contemplated in section 39'. Section 39(1) of the MPRDA, which has been repealed with the coming into force of the One Environmental System, required an applicant for a mining right to conduct an EIA and submit an EMP. The requisites for an EIA and EMP were prescribed in regulations 48-51 of the Mining Regulations.[21] Section 23(5) of the MPRDA provided that a mining right came into effect on the date on which the EMP was approved in terms of s 39(5).

[42] Section 38(1) of the MPRDA required the holder of a mining right to consider, investigate assess and communicate the impact of its mining on the environment as contemplated in s 24(7) of NEMA; and to manage all environmental impacts in accordance with its EMP. The main functions of an EMP under the MPRDA, is to establish baseline information concerning the affected environment; to investigate, assess and evaluate the impact of mining operations on the environment; to develop an environmental awareness plan describing the manner in which the applicant intended to inform its employees of any environmental risks; and to describe the manner in which it intended to modify, remedy, control or stop pollution or environmental degradation.[22]

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[21] The Mineral and Petroleum Resources Development Regulations published under 'GN R527, *GG* 26275, 23 April 2004'.

[22] Section 39(3) of the MPRDA provided:

'An applicant who prepares an environmental management programme or an environmental management plan must-

(a) establish baseline information concerning the affected environment to determine protection, remedial measures and environmental management objectives;

(b) investigate, assess and evaluate the impact of his or her proposed prospecting or mining operations on-

(i) the environment;

(ii) the socio-economic conditions of any person who might be directly affected by the prospecting or mining operation; and

(iii) any national estate referred to in section 3 (2) of the National Heritage Resources Act, 1999 (Act 25 of 1999), with the exception of the national estate contemplated in section 3 (2) (i) (vi) and (vii) of that Act;

(c) develop an environmental awareness plan describing the manner in which the applicant intends to inform his or her employees of any environmental risks which may result from their work in the manner in which the risks must be dealt with in order to avoid pollution or the degradation of the environment; and

[43] The distinction drawn between an environmental authorisation in terms of NEMA and an EMP under the MPRDA in the cases, is thus not surprising. As already stated, it was rightly asserted in *Mineral Sands Resources*,[23] that mining typically involves listed activities and therefore the holder of a mining right requires environmental authorisation in terms of s 24 of NEMA. Likewise, the court in *Mining and Environmental Justice Community Network SA*,[24] followed the integrative approach to the protection of the environment, enjoined by NEMA. In an application to review and set aside a decision permitting coal mining in a protected wetlands area, it held that in order for a party to conduct mining activities, it must obtain a mining right and approval of an EMP in terms of the MPRDA, as well as environmental authorisation for listed activities in terms of s 24 of NEMA.[25]

[44] Solely for these reasons, the high court's finding that 'the environmental impacts of mining were regulated exclusively under the MPRDA (2002) in terms of approved EMPs', is erroneous. First, it is at odds with the plain wording of the provisions of both the MPRDA and NEMA, in particular the requirements of NEMA concerning an environmental authorisation, referred to in paragraphs 28-31 above, as well as the general objectives of integrated environmental management laid down in Chapter 5 thereof. Second, *Maccsand* makes it clear that the MPRDA cannot be read to override the applicability or requirements of other laws.[26] Indeed, and as stated in *Maccsand*, s 23(6) of the MPRDA expressly renders a mining right granted under that Act subject to 'any relevant law'.[27]

(d) describe the manner in which he or she intends to-

(i) modify, remedy, control or stop any action, activity or process which causes pollution or environmental degradation;

(ii) contain or remedy the cause of pollution or degradation and migration of pollutants; and comply with any prescribed waste standard or management standards or practices.'

[23] *Mineral Sands Resources* fn 5 paras 7, 8 and 17.

[24] *Mining and Environmental Justice Community Network of South Africa and Others v Minister of Environmental Affairs and Others* [2019] 1 All SA 491 (GP).

[25] *Mining and Environmental Justice Community Network of SA* fn 22 para 4.

[26] *Maccsand* fn 8 para 45.

[27] *Maccsand* fn 8 para 44. Section 23(6) provides:

[45] There is no provision in the MPRDA or NEMA which suggests that decision-making in relation to the environmental impacts of mining is left to functionaries of the DMR. The converse is true: s 38 of the MPRDA, prior to its repeal with effect from 8 December 2014, enjoined the holder of a mining right at all times to give effect to the general objectives of integrated environmental management laid down in Chapter 5 of NEMA; and to consider, investigate assess and communicate the impact of its mining on the environment as contemplated in s 24(7) of NEMA. The very purpose of Chapter 5 – containing the prohibition against the commencement of listed activities without environmental authorisation – is the *integrated* environmental management of activities. Section 24(1) of NEMA states, in terms, that the purpose of the identification of listed activities is to give effect to the general objectives of integrated environmental management laid down in Chapter 5.

[46] The mandatory objectives of integrated environmental management in Chapter 5 of NEMA plainly apply to mining and related activities. These include the integration of the s 2 principles into all decisions that may significantly affect the environment; identifying and evaluating actual and potential impacts on the environment and options for mitigation of activities; and ensuring that the effects of activities on the environment are adequately considered before actions are taken.[28]

'A mining right is subject to this Act, any relevant law, the terms and conditions stated in the right and the prescribed terms and conditions and is valid for the period specified in the right, which period may not exceed 30 years.'

[28] Section 23 of NEMA provides:

'(1) The purpose of this chapter is to promote the application of appropriate environmental management tools in order to ensure the integrated environmental management of activities,

(2) The general objective of integrated environmental management is to–

(a) promote the integration of the principles of environmental management set out in section 2 into the making of all decisions which may have a significant effect on the environment;

(b) identify, predict and evaluate the actual and potential impact on the environment, socio-economic conditions and cultural heritage, the risks and consequences and alternatives and options for mitigation of activities, with a view to minimising negative impacts, maximising benefits, and promoting compliance with the principles of environmental management set out in section 2;

[47] What is more, s 24(7) of NEMA, to which the holder of a mining right is expressly subject, provides that the procedures for the investigation, assessment and communication of the potential impact of activities must, at a minimum, provide for 'co-ordination and co-operation between organs of state in the consideration of assessments where an activity falls under the jurisdiction of more than one organ of state'.[29] This is a powerful indicator that the MPRDA does not cover the environmental impacts of mining; neither does it leave decision-making on those impacts solely to functionaries of the DMR.

[48] That the MPRDA does not cover the field, is made even clearer in ss 24(8)*(a)*, 24K and 24L of NEMA. These provisions were inserted by s 2 of the 2008 NEMA Amendment Act[30] (ie after the enactment of the MPRDA) and came into effect on 1 May 2009. Section 24(8)*(a)* of NEMA provides that authorisations obtained under any other law (such as the MPRDA) for an activity listed in terms of NEMA, do not absolve an applicant from obtaining authorisation under NEMA:

'Authorisations obtained under any other law for an activity listed or specified in terms of this Act does not absolve the applicant from obtaining authorisation under this Act unless an authorisation has been granted in the manner contemplated in section 24L.'

[49] Section 24L(1) of NEMA provides for the alignment of environmental authorisations. More specifically, it states that where a listed activity contemplated in s 24 of NEMA is also regulated in terms of another law, the

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(c) ensure that the effects of activities on the environment receive adequate consideration before actions are taken in connection with them;
(d) ensure adequate and appropriate opportunity for public participation in decisions that may affect the environment;
(e) ensure the consideration of environmental attributes in management and decision-making which may have a significant effect on the environment; and
(f) identify and employ the modes of environmental management best suited to ensuring that particular activities pursued in accordance with the principles of environmental management set out in section 2.'

[29] Section 24(7)*(g)* of NEMA.

[30] National Environmental Management Amendment Act 62 of 2008.

authority empowered under that other law to authorise that activity and the competent authority authorised to issue an environmental authorisation under NEMA, may exercise their respective powers jointly by issuing separate authorisations or an integrated environmental authorisation.[31] This, however, does not remove the requirement of an environmental authorisation under NEMA to conduct a listed activity.[32] In terms of s 24L(4), a competent authority empowered to issue an environmental authorisation under NEMA may regard an authorisation in terms of any other legislation that meets the requirements of NEMA, as an environmental authorisation under NEMA.

[50] Section 24K(1) of NEMA authorises the Environment Minister or an MEC responsible for environmental affairs to 'consult with any organ of state responsible for administering legislation relating to any aspect of an activity that also requires environmental authorisation under [NEMA] in order to coordinate the respective requirements of such legislation and to avoid duplication'.

[51] What all of this shows, is that the provisions of NEMA apply alongside those of the MPRDA relating to mining rights and EMPs, and there is no basis to restrict the application of Chapter 5 of NEMA, as Tendele seeks to do. The two laws serve different purposes within the competence of the authorities responsible for their administration. *Maccsand* illustrates the point.[33] A company, Maccsand, had been granted a mining right to mine under the MPRDA. In terms of that right it was authorised to enter and bring on to the relevant land, equipment and

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[31] Section 24L of NEMA provides:

'**Alignment of environmental authorisations-**

(1) If the carrying out of a listed activity or specified activity contemplated in section 24 it is also regulated in terms of another law or a specific environmental management Act, the authority empowered under that other law or specific environmental management Act to authorise that activity in the competent authority empowered under Chapter 5 to issue an environmental authorisation in respect of that activity may exercise their respective powers jointly by issuing–

(a) separate authorisations; or

(b) an integrated environmental authorisation.

[32] *City of Cape Town v Maccsand (Pty) Ltd and Others* 2010 (6) SA 63 (WCC) paras 10 and 11.

[33] *Maccsand* fn 8.

materials to construct surface, underground or undersea infrastructure required for the purposes of mining. Maccsand contended that because it had various rights under the MPRDA, it did not need to obtain planning consent by the City of Cape Town under the Land Use Planning Ordinance 15 of 1985. Rejecting this contention, the Constitutional Court said:

'If it is accepted, as it should be, that LUPO regulates municipal land planning and that, as a matter of fact, it applies to land which is the subject matter of these proceedings, then it cannot be assumed that the mere granting of a mining right cancels out LUPO's application. There is nothing in the MPRDA suggesting that LUPO will cease to apply to land upon the granting of a mining right or permit. By contrast, section 23(6) of the MPRDA proclaims that a mining right granted in terms of that Act is subject to it and other relevant laws.'[34]

[52] Moreover, the high court's interpretation is inconsistent with the constitutional injunction to interpret statutes in a way that gives the right to protection of the environment its fullest possible effect. The principles in s 2 of NEMA must guide the interpretation, administration and implementation of NEMA and any other law concerned with environmental protection or management, such as the MPRDA: not the other way around. Otherwise construed, NEMA is deprived of direct force in relation to mining activities, and effectively sidestepped. Its mandatory principles would then only be applied insofar as they are reflected in the MPRDA and the separate environmental authorisation required for listed activities in s 24(2) of NEMA, would be rendered nugatory.

[53] This interpretation, contrary to Tendele's assertion and the high court's finding, does not result in a 'duplication' of regulatory functions, nor 'competing

[34] *Maccsand* fn 8 para 44, affirmed recently in *Maledu and Others v Itereleng Bakgatla Mineral Resources (Pty) Ltd and Another* [2018] ZACC 41; 2019 (2) SA 1 (CC) para 106: 'This conclusion also finds support in this Court's decision in *Maccsand*. *In Maccsand*, this Court held that the exercise of a mining right was subject to any other laws bearing on such a right. The MPRDA was not read to override the applicability or requirements of other statutes, such as the Land Use Planning Ordinance, that may impact upon mining activity'.

and contradictory but mandatory directions' by regulatory authorities. As shown above, s 24K(1) of NEMA refutes any duplication argument. In any event a similar argument was rejected in *Maccsand*:[35]

'Another criticism levelled at the finding of the Supreme Court of Appeal by Maccsand and the Minister for Mineral Resources was that, by endorsing a duplication of functions, the Court enabled the local sphere to veto decisions of the national sphere on a matter that falls within the exclusive competence of the national sphere. At face value this argument is attractive but it lacks substance. The Constitution allocates powers to three spheres of government in accordance with the functional vision of what is appropriate to each sphere. But because these powers are not contained in hermetically sealed compartments, sometimes the exercise of powers by two spheres may result in an overlap. When this happens, neither sphere is intruding into the functional area of another. Each sphere would be exercising power within its own competence. It is in this context that the Constitution obliges the spheres of government to cooperate with one another in mutual trust in good faith, and to coordinate actions taken with one another. The fact that in this case mining cannot take place until the land in question is appropriately rezoned is therefore permissible in our constitutional order. It is proper for one sphere of government to take a decision whose implementation may not take place until consent is granted by another sphere, within whose area of jurisdiction the decision is to be executed. If consent is, however, refused it does not mean that the first decision is vetoed. The authority from whom consent was sought would have exercised its power, which does not extend to the power of the other functionary. This is so in spite of the fact that the effect of the refusal in those circumstances would be that the first decision cannot be put into operation. This difficulty may be resolved through cooperation between the two organs of state, failing which, the refusal may be challenged on review.'

[54] In *Fuel Retailers*,[36] the issue was whether environmental authorities had considered the social, economic and environmental impacts of constructing a filling station. In resisting an application to review and set aside its decision authorising the construction of the filling station, the relevant government department contended that issues of need and desirability had been considered by

[35] *Maccsand* fn 8 paras 47-48; *Telkom SA SOC Limited v City of Cape Town and Another* [2020] ZACC 15; 2020 (10) BCLR 1283 (CC) para 35.
[36] *Fuel Retailers* fn 10 para 86.

the local authority when it decided the application to rezone the property for the purpose of constructing the filling station. Therefore, so it was contended, the local authority did not have to reassess those issues. The Constitutional Court rejected this contention and held that each functionary operates within the purpose and ambit of its own enabling statutory provisions when taking administrative action. Thus, the satisfaction of the requirements of a specific section or Act does not equate to satisfaction of a similar requirement in a different section or Act. The court said:

'The environmental authorities assumed that the duty to consider need and desirability in the context of the Ordinance imposes the same obligation as the duty to consider the social, economic and environmental impact of a proposed development as required by the provisions of NEMA. They were wrong in that assumption.'

[55] It follows that the decision to grant a mining right and approve an EMP in terms of the MPRDA, may not be implemented without an environmental authorisation, if the holder of that right and EMP undertakes a listed activity as envisaged in NEMA. The presumption against the retrospective operation of statutes simply does not arise: the requirement of an environmental authorisation under NEMA does not take away or impair Tendele's mining right or EMP under the MPRDA.[37]

[56] This is confirmed by the language of the transitional provisions themselves. The relevant provisions of s 12 of the 2008 NEMA Amendment Act, as amended by Act 25 of 2014 provide:

'(2) An application for authorisation of an activity that is submitted in terms of Chapter 5 of [NEMA] and that is pending when this Act takes effect must, despite the amendment of [NEMA] by this Act, be dispensed with in terms of Chapter 5 of [NEMA] as if Chapter 5 had not been amended.

[37] *Unitrans Passenger (Pty) Ltd t/a Greyhound Coach Lines v Chairman, National Transport Commission and Others; Transnet (Autonet Division) v Chairman National Transport Commission and Others* 1999 (4) SA 1 (SCA) para 12.

…

(4) An environmental management plan or programme approved in terms of the [MPRDA] immediately before the date on which this Act came into operation must be regarded as having been approved in terms of [NEMA] as amended by this Act.'

[57] Three points should be made. First, the transitional provisions do not dispense with an environmental authorisation as a prerequisite for undertaking a listed activity: the opposite is true. Second, an EMP approved under the MPRDA does not have the status of an environmental authorisation under NEMA. That much is clear from the definitions in NEMA.[38] And third, s 12(4) means no more than that an EMP approved under the MPRDA must be accepted as an EMP issued in terms of NEMA. An EMP is but one of the prescribed environmental management instruments referred to in s 24(5) of NEMA. Put differently, the introduction of the One Environmental System with effect from 8 December 2014, did not retroactively deprive Tendele of its EMPs approved under the MPRDA.

The Minister's failure to act: a relevant consideration?

[58] In support of its finding that Tendele's EMPs were valid under the transitional provisions, the high court referred to the Environment Minister's power under s 12(5) of the 2008 NEMA Amendment Act to direct the holder of an old order mining right to upgrade an EMP to address any deficiencies that may lead to unacceptable environmental consequences. The court said:

'To date the Minister has not acted against Tendele in terms of s 12(5) of the NEMA Amendment Act, 2008. This suggests to me that the Minister is thus far satisfied about Tendele's approved EMPs and the manner in which it conducts its mining operations at Somkhele . . .

[38] An 'environmental authorisation' includes the authorisation by a competent authority of a listed activity or specified activity in terms of NEMA. An 'environmental management programme' means a programme required in terms of s 24 of NEMA.

It seems to me that the Minister is well aware of Tendele's operations at Somkhele and that they are conducted in terms of approved EMPs. He also seems to be satisfied that such EMPs adequately address the environmental impacts of such operations at Somkhele. If the Minister was not so satisfied he would not have granted Tendele further mining rights as he did in 2016 to expand its mining operations in Reserve 3.'

[59] The high court erred. It is impermissible to interpret a statute according to the conduct or practice of a government functionary. The Constitutional Court put it thus:[39]

'Missing from this formulation is any explicit mention of a further fundamental contextual change, that from legislative supremacy to constitutional democracy. Why should a unilateral practice of one part of the executive arm of government play a role in the determination of the reasonable meaning to be given to a statutory provision? It might conceivably be justified where the practice is evidence of an impartial application of a custom recognised by all concerned, but not where the practice is unilaterally established by one of the litigating parties. In those circumstances it is difficult to see what advantage evidence of the unilateral practice will have for the objective and independent interpretation by the courts of the meaning of legislation, in accordance with constitutionally compliant precepts. It is best avoided.'

[60] For the above reasons, and having regard to the language, context and purposes of the relevant statutory provisions,[40] I have come to the conclusion that environmental authorisation to conduct a listed activity, in terms of s 24(2) of NEMA, is a requirement for mining. Consequently, Tendele's mining operations are unlawful. The appropriate relief is set out below.

Land use approvals

[39] *Marshall and Others v Commission for the South African Revenue Service* [2018] ZACC 11; 2018 (7) BCLR 830 (CC) para 10.
[40] *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; 2012 (4) SA 593 (SCA) para 18, approved in *Airports Company South Africa v Big Five Duty-Free (Pty) Ltd* [2018] ZACC 33; 2019 (5) SA1 (CC) para 9.

[61] The appellants' case that Tendele's mining activities are unlawful because it has not obtained municipal approval for its mining operations, may be outlined as follows. Tendele does not have municipal approval to develop the land on which it conducts mining operations, as contemplated in s 38 of the KwaZulu-Natal Planning and Development Act 6 of 2008 (the KZN Planning Act). Section 48(3) of that Act prohibits any development without municipal approval. Tendele also does not have permission to use the land (Reserve No 3) for 'mining purposes' as envisaged in the Spatial Planning and Land Use Management Act 16 of 2013 (SPLUMA). It also requires approval of a 'mining operation' as defined in Schedule 2 to the Mtubatuba SPLUMA By-Law of January 2017 (The Mtubatuba By-Law).

[62] In this Court the appellants accepted that the KZN Planning Act which came into force on 1 May 2010, and SPLUMA, which commenced on 1 July 2015, do not apply retrospectively. Accordingly, mining operations by Tendele prior to the commencement of these statutes are lawful. This however, so it was contended, does not apply to new mining which may be conducted after the commencement of the KZN Planning Act and SPLUMA, in terms of the mining right granted to Tendele in 2016.

[63] Section 38(1) KZN Planning Act provides:

'The development of land situated outside the area of the scheme may only occur to the extent that it has been approved by the municipality in whose area the land is situated.'

Section 38(3) defines 'development' as follows:

'[T]he carrying out of building, construction, engineering, mining or other operations on, under or over any land, and a material change to the existing use of any building or land without subdivision.'

[64] It is evident from this definition that the KZN Planning Act was not intended to regulate existing mining. Tendele's mining operations do not fall

within the definition of development in s 38(3), since it was already conducting mining operations on Reserve No 3 when the KZN Planning Act came into force. That mining does not constitute a material change to the existing use of land.

[65] Aside from this, it was not the appellants' case that the exercise of the mining right granted to Tendele in 2016 in respect of Areas 4 and 5, would constitute a material change to the existing use of land. Had such a case been pleaded, Tendele would have been able to put up evidence to show that the mining which is to take place in terms of the Areas 4 and 5 right, does not constitute a new use of land, but merely an extension of the existing use of the same land, ie mining on another portion of Reserve No 3; or that future mining is related to the mining that has been conducted at the mine to date.

[66] The same applies to the attack based on SPLUMA. It is unsustainable, both on the pleadings and a proper construction of the relevant statutory provisions. In terms of s 26(2), land may be used only for the purposes permitted by a land use scheme, by a town planning scheme (until such a scheme is replaced by a land use scheme), 'or in terms of subsection (3)'. Section 26(3) provides for the continuation, after the commencement of SPLUMA, of certain land uses in specific circumstances:

'Where no town planning or land use scheme applies to a piece of land, before a land use scheme is approved in terms of this Act, such land may be used only for the purposes listed in Schedule 2 to this Act and for which such land was lawfully used or could lawfully have been used immediately before the commencement of this Act.'

One of the land use purposes listed in Schedule 2 is 'mining purposes', defined in the Schedule as, 'purposes normally or otherwise reasonably associated with the use of land for mining'.

[67] Self-evidently, the purpose of s 26(3) is to maintain the existing land use regime applicable to land, in respect of which no town planning scheme or land

use scheme applied when SPLUMA came into force, until a land use scheme is approved in terms of SPLUMA. It achieves this by permitting the use of land for certain purposes to continue where such land was lawfully being used for that purpose immediately before commencement of SPLUMA. It follows that the provisions of the Mtubatuba By-Law cannot trump the provisions of SPLUMA. Tendele's mining operations are not in breach of SPLUMA or the Mtubatuba By-Law.

Waste Management

[68] The founding affidavit states that there are massive stockpiles of waste rock at the mine and that Tendele's mining activities result in liquid coal waste and coal sludge or slurry. The process of crushing and washing coal produces liquid waste along with huge stockpiles of solid waste. Attached to the affidavit are photographs depicting huge mining dumps and rock dumps. The appellants alleged that the waste produced by Tendele falls within the definition of 'hazardous waste' in Schedule 3 to the Waste Act, which includes 'residue stockpiles' and 'wastes from the pyrolytic treatment of coal'.[41] The concept 'residue stockpile' includes waste derived from a mining operation and which is stockpiled, and wastes resulting from mining.[42] Tendele does not have a waste management licence as required by the Waste Act and is therefore mining illegally.

[69] Section 20 of the Waste Act provides that no person may commence, undertake or conduct a waste management activity, except in accordance with a

[41] In Schedule 3 to the Waste Act, '**"hazardous waste"** means any waste that contains organic or inorganic elements or compounds that may, owing to the inherent physical, chemical or toxicological characteristics of that waste, have a detrimental impact on health and the environment and includes hazardous substances, materials or objects within business waste, residue deposits and residue stockpiles as outlined. . . '.

[42] In Schedule 3 to the Waste Act, '**"residue stockpile"** means any debris, discard, tailings, slimes, screening, slurry, waste rock, foundry sand, mineral processing plant waste, ash or any other product derived from or incidental to a mining operation and which is stockpiled, stored or accumulated within the mining area for potential re-use, or which is disposed of, by the holder of a mining right, mining permit or, production right or an old order right, including historic mines and dumps created before the implementation of this Act'.

waste management licence or the requirements or standards determined in terms of s 19(3). A 'waste management activity' is defined as an activity listed in Schedule 1 or published by notice in the Gazette under s 19.

[70] In terms of s 19 of the Waste Act, the Environment Minister on 29 November 2013, published a list of waste management activities that have or are likely to have a detrimental effect on the environment (the 2013 listing notice). Regulation 7(1) of the 2013 listing notice states:

'A person who lawfully conducts a waste management activity listed in this schedule on the date of the coming into effect of this notice may continue with the waste management activity until such time that the Minister by notice in the Gazette calls upon such person to apply for a waste management licence.'

[71] It was argued on behalf of the appellants that the high court's conclusion that Tendele's conduct was lawful because the Minister had not called upon it to apply for a waste management licence, was wrong because it incorrectly ascribed to the Minister the power to determine the legality of Tendele's conduct. This, so it was argued, undermines the judicial function: the courts should determine the legality of conduct. It was also argued that regulation 7(1) cannot, in effect, immunise Tendele against obtaining a waste management licence, especially where this occurs due to the inaction of the Minister.

[72] These arguments, however, do not assist the appellants, for two reasons. The first is that a notice of waste management activities in terms of s 19(1) of the Waste Act, 'may contain transitional and other special arrangements in respect of waste management activities that are carried out at the time of their listing'.[43] Regulation 7(1) is thus specifically authorised. The second is that the appellants have not challenged the constitutionality of regulation 7(1). This regulation is not

[43] Section 19(3)*(c)* of the Waste Act.

void or non-existent, but exists as a fact and remains lawful until it is set aside.[44] The appellants have not established that Tendele is mining unlawfully because it does not have a waste management licence.

Relocation of traditional graves

[73] Section 35 of the KZN Heritage Act provides that before any grave may be damaged, altered, exhumed or removed, prior written consent must be obtained from AMAFA Heritage Council. The Council must be satisfied that an applicant has made concerted efforts to engage the relevant communities affected, and that those communities have agreed to the relocation of graves.[45]

[74] Ms Shiela Berry, a trustee of the first appellant, in her affidavit states that when Tendele started mining, there were many graves on the mining site which were exhumed and moved to another graveyard with no regard for the Zulu people's deep respect for their ancestors. This graveyard is situated on a slope, and some of the graves have been undercut by rain and are slumping. In some of the graves body parts can be seen.

[75] Mr Du Preez states that Tendele 'did not appreciate the process that the mine was required to follow in order to relocate traditional graves', and that its failure to obtain authorisation 'was due to a bona fide oversight'. This is improbable. On its own version, Tendele's consultant, Groundwater Consulting

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[44] *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* 2004 (6) SA 222 (SCA) para 26; *Merafong Local Municipality v AngloGold Ashanti Limited* [2016] ZACC 35; 2017(2) SA 211 (CC) para 36.

[45] Section 35 of the KZN Heritage Act provides:

'**General Protection**: Traditional burial places –

35.(1) No grave–

(a) not otherwise protected by this Act; and

(b) not located in a formal cemetery managed or administered by a local authority,

may be damaged, altered, exhumed, removed from its original position, or otherwise disturbed without the prior written approval of the Council having been obtained on written application to the Council.

(2) The Council may only issue written approval once the Council is satisfied that–

(a) the applicant has made a concerted effort to consult with communities and individuals who by tradition may have an interest in the grave; and

(b) the applicant and the relevant communities or individuals have reached agreement regarding the grave.'

Services (GCS), had advised it in 2007 already, that grave relocation needed to be dealt with separately from a heritage impact assessment. Tendele engaged AMAFA Heritage Council only in 2017 – some 10 years later. In its report to Tendele in December 2007, GCS described the importance of gravesites to the community as follows:

'Many of the local residents place great religious significance on gravesites. This strong reverence for graves emerges from the belief that the spirit (ithongo or moya, in Zulu) of individual persons continue to maintain an active interest in and affect the living (mostly relatives). Spirits of deceased relatives are referred to as ancestors (ukhokho, in Zulu) and much of their interactions with their living descendants take place with reference to their graves. Consequently, graves have developed into sites of particular social significance and not only stand as symbols of the relationship between the living and the dead, but also represent a locale where these relationships can be articulated and find expression. It is largely the practice of ancestor worship that has led graves to acquire a particularly strong cultural significance that they have. Residents in the area regard ancestor worship as an ancient religious practice.'

[76] It appears from the answering papers that prior to consulting AMAFA Heritage Council, Tendele had entered into detailed agreements with members of the community for the relocation of graves. In terms of this agreement, the relatives of deceased persons were paid an amount of R8 500 'in respect of all Family Graves', located in the mining area. The agreement states that '"all Family Graves" means the total of all graves [of relatives of the person concluding the agreement] located at the Premises'.

[77] The answering affidavit states that all relocations of traditional graves have taken place in consultation with the affected families and communities, and that Tendele has engaged in consultations with AMAFA Heritage Council to ensure that its conduct in relation to traditional graves complies with the law. At a meeting with the Council on 8 May 2017, Tendele gave an undertaking that in future, no graves would be exhumed or relocated without the necessary permits.

[78] On the strength of this undertaking and Tendele's engagements with AMAFA Heritage Council, the high court stated that the Council 'would have said something regarding Tendele's conduct if it was not satisfied with the manner in which traditional graves were being relocated'. It held that the appellants failed to make out a proper case for an interdict.

[79] Whether the relocation of graves is unlawful cannot be decided by reference to the view taken by the AMAFA Heritage Council. It is common ground that Tendele has removed or altered traditional graves in violation of the KZN Heritage Act. That plainly, was unlawful. It is conduct grossly inconsistent with the Constitution, and invalid.

[80] Given the particular circumstances of this case, it is my considered view that although the appellants asked for an interdict in the notice of motion, a declaratory order would constitute appropriate relief.[46] This order should not be suspended, since Tendele does not conduct unplanned mining. It must know in advance which graves need to be relocated and it has demonstrated that it is able to comply with the provisions of the KZN Heritage Act.

Relief

[81] The appellants sought an order interdicting Tendele from carrying on with any mining operations in Areas 1, 2 and 3 on Reserve No 3; the KwaQubuka and Luhlanga areas on Reserve No 3; and one part of the remainder of Reserve No 3, 'until further order' of the high court. Although the appellants did not ask for a declaratory order, such an order would be just and equitable in the circumstances, for the reasons stated below.

[46] *Economic Freedom Fighters and Others v Speaker of the National Assembly and Another* [2017] ZACC 47; 2018 (2) SA 571 (CC) para 211.

[82] Section 172(1)*(a)* of the Constitution applies. It provides that conduct inconsistent with the Constitution must be declared invalid. The court has no discretion. In terms of s 172(1)*(b)* the court has a discretion to grant just and equitable relief, either independently or together with a declaratory order.[47] The power in s 172(1)*(b)* to make any order that is just and equitable is not limited to declarations of invalidity; and 'is so wide and flexible that it allows Courts to formulate an order that does not follow prayers in the notice of motion'.[48]

[83] In the exercise of this wide remedial power, the Constitutional Court has highlighted the need for courts to be pragmatic in crafting just and equitable remedies.[49] A pragmatic approach that grants effective relief – that upholds, enhances and vindicates the underlying values and rights entrenched in the Constitution[50] – and which will allow Tendele, the primary employer in Mtubatuba, to continue mining while it brings itself into compliance with NEMA, is called for in this case.

[84] If Tendele's mining operations are brought to a grinding halt, this would have catastrophic consequences. The mine is the primary driver of economic activity in Mtubatuba. It employs over 1000 people and 83% of its employees live in the Mpukunyoni area surrounding the mine. According to the Integrated Development Plan of the Mtubatuba Municipality, mining is one of the major employment sectors in the municipality; and the unemployment rate in the area

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[47] Section 172(1) of the Constitution provides:
'**172 Powers of courts in constitutional matters**
(1) When deciding a constitutional matter within its power, a court-
(a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and
(b) may make any order that is just and equitable, including-
(i) an order limiting the retrospective effect of the declaration of invalidity; and
(ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect.'

[48] *Economic Freedom Fighters* fn 46 paras 210- 211.

[49] *Electoral Commission v Mhlope and Others* [2016] ZACC 15; 2016 (5) SA 1 (CC) para 132.

[50] *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC) para 34.

which previously was at 59.7%, had improved to 39% in 2011, as a result of the mining operations at Somkhele.

[85] The Mpukunyoni *amici* submitted that if mining operations were to stop, the South African anthracite market would be wiped out, which would have a knock-on effect on the ferrochrome industry that employs more than 20,000 people and is a major exporter in the South African economy. Tendele has also made significant investments in the development of the area, which include the provision of apprenticeships, training in farming activities, adult basic education and training, bursaries and student teachers. Between December 2006 and December 2016, Tendele spent R719 million on local community employee salaries; R54 million on community projects in accordance with approved social and labour plans annexed to the Tendele mining rights; and R300 million on procuring services from community-based black economic empowerment companies.

[86] The termination of mining operations, even temporarily, would be the death knell of the Mtubatuba economy and would result in the loss of the livelihood of the Mpukunyoni community, together with significant benefits described above. For these reasons, Tendele and the Mpukunyoni *amici* have asked this Court to grant Tendele an opportunity to regularise its position in relation to the requisite statutory approvals.

Costs

[87] The high court stated that there was ‘no reason why costs should not follow the result’ and ordered the appellants to pay Tendele’s costs. Tendele has since abandoned the costs order. However, a notice of abandonment does not overturn the judgment of the court a quo, which remains on the public record and is available to persons researching or seeking a direction on costs in an

environmental law dispute. There is no public record that the costs order was abandoned.

[88] It is trite that a judgment stands unless it is rescinded, or set aside by an appellate court. The abandonment of a judgment is a unilateral act which operates *ex nunc* and not *ex tunc*. It precludes the party who has abandoned its rights under the judgment from enforcing it, but the judgment still exists with all its intended legal consequences.[51]

[89] An award of costs involves the exercise of a discretion. It is a settled principle that an appellate court does not lightly interfere with the exercise of a true discretion, unless it is shown that the discretion was not exercised judicially, more specifically, that the decision could not reasonably have been reached by a court properly directing itself to the relevant facts and principles.[52] The CER submitted that the high court did not exercise its discretion judicially when it ordered the appellants to pay Tendele's costs, and that the costs order should be overturned whatever the outcome of the appeal.

[90] The costs order not only has an obvious chilling effect on the enforcement of a constitutional right,[53] but the high court also disregarded the protection against an adverse costs order contained in NEMA itself. Section 32(2) states:

'A court may decide not to award costs against the 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 of 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

[51] *Engen Petroleum Ltd v Paargen Erf 116 (Pty) Ltd t/a Impala Motors and Others* [2018] ZANWHC 27 para 9.
[52] *Public Protector v South African Reserve Bank* [2019] ZACC 29; 2019 (9) BCLR 1113 (CC) para 107.
[53] *Biowatch Trust v Registrar Genetic Resources and Others* [2009] ZACC 14; 2009 (6) SA 232 (CC) para 21.

of protecting the environment and had made due efforts to use other means reasonably available for obtaining the relief sought.'

[91] It is clear from the founding papers that the appellants were seeking to enforce the right to have the environment protected, contained in s 24 of the Constitution, as well as the provisions of NEMA and various other environmental management statutes. The application for the interdict was brought in the public interest, the interests of the people residing in the vicinity of the mine affected by mining operations and in the interests of the appellants' members, as envisaged in s 38 of the Constitution.

[92] In the light of the facts and principles outlined above, the order directing the appellants to pay Tendele's costs is not one that could reasonably have been made. The high court failed to exercise its discretion judicially and the costs order must be set aside.

[93] In the result, I would make the following order:

1 The appeal succeeds with costs, including the costs of two counsel.

2 The order of the high court is set aside and replaced with the following:

'2.1 It is declared that the commencement or continuation of mining operations by the first respondent on the properties listed below (the properties) is unlawful and unconstitutional, unless and until it has been granted an environmental authorisation in terms of the National Environmental Management Act 107 of 1998 (NEMA), to undertake the relevant listed activities contained in the List of Activities and Competent Authorities Identified in terms of Sections 24(2) and 24D of NEMA, published under Government Notices R983, 984 and 985, in *Government Gazette* 38282 of 4 December 2014:

(a) Area 1 on Reserve No 3 (Somkhele) No 15822, measuring 660.5321 hectares as described in the mining right dated 22 June 2007;

(b) Areas 2 and 3 on Reserve No 3 (Somkhele) No 15822, measuring 779.8719 hectares as described in the mining right dated 30 March 2011;

(c) The KwaQubuka and Luhlanga areas on Reserve No 3, measuring 706.0166 hectares as described in the mining right dated 8 March 2013;

(d) Areas 4 and 5 on part of the remainder of Reserve No 3 No 15822, in extent to 21233.0525 hectares as described in the mining right dated 26 October 2016.

2.2 It is declared that the first respondent's commencement or continuation of mining operations on the properties is unlawful and unconstitutional, unless and until it has obtained written approval in terms of s 35 of the KwaZulu-Natal Heritage Act 4 of 2008 to damage, alter, exhume or remove any traditional graves from their original positions.

2.3 The order in paragraph 2.1 above is suspended for a period of 12 months to enable the first respondent to obtain the requisite environmental authorisation. In the event that the first respondent does not obtain that authorisation within the said period, it shall be entitled to apply to this Court for an extension of the period, setting out the steps taken to obtain environmental authorisation; the status of that application; and why a further suspension of the order in paragraph 2.1 is necessary.

2.4 The first respondent is ordered to pay the costs of the application, including the costs of two counsel.'

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A SCHIPPERS

JUDGE OF APPEAL

Ponnan JA (Plasket and Nicholls JJA and Ledwaba AJA concurring):

[94] Motion proceedings, said Harms DP in *National Director of Public Prosecutions v Zuma*, 'are all about the resolution of legal issues based on common cause facts'.[54] He added:

'Unless the circumstances are special they cannot be used to resolve factual issues because they are not designed to determine probabilities. It is well established under the *Plascon-Evans* rule that where in motion proceedings disputes of fact arise on the affidavits, a final order can be granted only if the facts averred in the applicant's (Mr Zuma's) affidavits, which have been admitted by the respondent (the NDPP), together with the facts alleged by the latter, justify such order. It may be different if the respondent's version consists of bald or uncreditworthy denials, raises fictitious disputes of fact, is palpably implausible, far-fetched or so clearly untenable that the court is justified in rejecting them merely on the papers.'

[95] In motion proceedings, the affidavits constitute both the pleadings and the evidence.[55] The issues and averments in support of a party's case should appear clearly therefrom.[56] They serve, not just to define the issues between the parties, but also to place the essential evidence before the court. An applicant must therefore raise in the founding affidavit the issues as well as the evidence upon which it relies to discharge the onus of proof resting on it.

[96] It is impermissible for an applicant in motion proceedings to make out a new case in reply. As Cloete JA pointed out in *Minister of Land Affairs and Agriculture v D & F Wevell Trust,* '[t]he reason is manifest ─ the other party may well be prejudiced because evidence may have been available to it to refute the

[54] *National Director of Public Prosecutions v Zuma* [2009] ZASCA 1; 2009 (2) SA 277 (SCA); 2009 (1) SACR 361 (SCA); 2009 (4) BCLR 393 (SCA); [2009] 2 All SA 243 (SCA) para 26.
[55] *Transnet Ltd v Rubenstein* 2006 (1) SA 591 (SCA) para 28.
[56] *Minister of Land Affairs and Agriculture and Others v D & F Wevell Trust and Others* [2007] ZASCA 153; 2008 (2) SA 184 (SCA) para 43.

new case on the facts. The position is worse where the arguments are advanced for the first time on appeal'.

[97] In my view, this is precisely such a case. Seegobin J appeared to recognise as much in his judgment on the application for leave to appeal,[57] when he observed:

'I immediately point out that the applicants' case was very poorly pleaded on the papers. This much was fairly and properly conceded by Mr Ngcukaitobi 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.'

[98] That, ought to have led to the dismissal of the application for leave to appeal. Surprisingly, it did not. The learned judge proceeded to hold:

'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.'[58]

[99] If, indeed, the appellants 'had simply failed to make out a proper case' in their founding papers for the relief sought, it is difficult to comprehend why the learned judge took the view that the matter was nonetheless deserving of the attention of this Court. If, as he correctly points outs, the factual allegations relied

[57] *Global Environmental Trust and Others v Tendele Coal Mining (Pty) Ltd and Others* [2019] ZAKZPHC 62 para 7.
[58] *Global Environmental Trust* fn 57 para 8.

upon by the appellants were, 'for the most part, incorrect and unsubstantiated', that, one would have thought, would have been the end of the matter.

[100] Seegobin J felt impelled to grant leave to the appellants to appeal, because in his view there were 'issues of interpretation and questions of legality that may arise'. What those were, he did not elaborate. And, how one would get to those issues, given the evident unreliability of the appellants' allegations, remained unexplained. Despite this, my colleague Schippers JA inclines to the view that the appeal must succeed. Needless to say, I do not agree.

[101] The appellants seek an order interdicting the first respondent (Tendele), from conducting mining operations at its Somkhele mine. They contend that Tendele is mining without the necessary statutory authorisations and approvals. The interdict sought is far reaching. If granted, it would have the effect of closing Tendele's operations. More the reason, one would think, for a proper case to have been made out on the papers.

[102] The appellants say that Tendele's current mining operations are unlawful because it has no: (i) environment authorisation issued in terms of s 24 of the National Environmental Management Act 107 of 1998 (NEMA); (ii) land use authority, approval or permission from any municipality having jurisdiction; (iii) waste management licence issued by the fourth respondent, the Minister of Environmental Affairs (the Minister) in terms of s 43 of the National Environmental Management: Waste Act 59 of 2008 (the Waste Act); and (iv) written approval in terms of s 35 of the KwaZulu-Natal Heritage Act 4 of 2008 (the KZN Heritage Act) to damage, alter, exhume or remove any traditional graves.

[103] Tendele began its mining operations in 2006 pursuant to the grant of an 'old order' mining licence and subsequently a mining right, and the approval of an Environmental Management Programme (EMP), granted and approved in terms of the Mineral and Petroleum Resources Development Act 28 of 2002 (the MPRDA). The Somkhele Mine comprises a single mining area on Reserve No 3. However, the mining operations are divided amongst five areas and separate mining rights and EMP's apply to the different areas. The mining right in respect of Area 1 was granted to Tendele on 21 May 2007. The EMP applicable to the Area 1 mining right was approved on 22 June 2007. The Areas 2 and 3 converted mining right was granted to Tendele on 1 February 2011. On 8 March 2013, the right was amended to include the KwaQubuka and Luhlanga areas. The EMP attaching to the mining right of Areas 2 and 3 was approved on 30 March 2011. Amendments to this EMP, to cater for the inclusion of the KwaQubuka and Luhlanga areas were approved on 29 May 2012. The Areas 4 and 5 mining right was granted on 31 May 2016. The EMP applicable to this right was approved on 26 October 2016.

[104] Tendele is only actively mining in Area 1 and the extended area of Area 2, namely, the KwaQubuka and Luhlanga areas. The Mine's coal wash plants are located in Area 2. Mining operations are not being undertaken in Area 3. Mining operations ceased in Area 2 in January 2012, due to depletion of the anthracite reserves. Mining operations have not yet started in Areas 4 and 5. The second and third appellants have launched review proceedings to, inter alia, set aside the mining right granted in respect of Areas 4 and 5.

[105] The appellants seek to interdict all of Tendele's mining operations, until it has obtained the authorisations referred to in paragraph 96 above, which it says are required. In the view that I take of the matter, which is evidently much

narrower than that of my colleague, Schippers JA, the high court correctly refused to grant the relief sought.

As to (i)

[106] The appellants contend that Tendele is mining unlawfully because no environmental authorisation as contemplated by NEMA has been issued to it. According to the appellants, such environmental authorisation was required both prior to 8 December 2014, when the One Environmental System was introduced and, after that date.

[107] The question of whether Tendele was required to obtain an environmental authorisation as required by s 24F(1)*(a)* of NEMA does not arise on the papers, because the appellants failed to allege that Tendele is conducting any of the listed activities at Somkhele. The appellants' founding affidavit lacks the necessary allegations to sustain this ground of unlawfulness. Section 24F(1)*(a)* of NEMA prohibits the commencement of 'listed activities' in the absence of environmental authorisation. Listed activities are those identified in terms of s 24(2).

[108] Acting in terms of this section (and its predecessor, s 21 of the Environment Conservation Act 73 of 1989 (the ECA)), the Minister identified the activities that may not commence without environmental authorisation. Since the first list of activities was published in terms of the ECA on 5 September 1997, the list of activities has been replaced and amended on several occasions. New activities have been added; the definition of certain activities has been amended and some activities have been removed.

[109] Any allegation that Tendele has breached s 24F(1)*(a)* of NEMA, at a bare minimum, had to identify: (a) the listed activity alleged to have been commenced without environmental authorisation; and (b) the date on which that activity commenced. The appellants did not plead these essential facts in their founding affidavit. The sum total of the appellants' evidence in the founding affidavit on this score was the following:

'Normally speaking, mining is a listed activity which has an impact on the environment and as such an Environmental Authorisation ("EA") must be obtained in terms of the National Environmental Management Act 107 of 1998 (NEMA).'

[110] Tendele's answering affidavit set out why, as a matter of law, it contended that there is no requirement for environmental authorisation for its mining operations. It also pointed out that, under the ECA, authorisation under any environmental legislation was not required for mining operations or activities directly related thereto. Given the case that it was called upon to answer, Tendele's answering affidavit was a perfectly legitimate response. It bore no onus or evidentiary duty.

[111] In their replying affidavit, the appellants stated:

'It is accepted that there are no listed activities related to "mining" as a special category. However, there are a host of listed activities which relate to mining. These are set out in a table which is annexure 'R1' hereto.'

That was the high-water mark of the appellants' case. Annexure R1 contains a list of the activities requiring environmental authorisation under NEMA. The appellants made no effort, even in reply, to identify which of the activities Tendele was allegedly undertaking, nor when Tendele allegedly commenced them.

[112] Indeed, as pointed out in *Minister of Land Affairs and Agriculture v D & F Wevell Trust*:

'It is not proper for a party in motion proceedings to base an argument on passages in documents which have been annexed to the papers when the conclusions sought to be drawn from such passages have not been canvassed in the affidavits . . . A party cannot be expected to trawl through lengthy annexures to the opponent's affidavit and to speculate on the possible relevance of facts therein contained. Trial by ambush cannot be permitted.'[59]

[113] In any event, by the time of the replying affidavit it was already too late. These are the kinds of allegations that should have been included in the founding affidavit so that Tendele could answer them. On appeal, the appellants try to escape this difficulty by casting a duty or onus on Tendele to have supplied the missing allegations, either in its answering affidavit or the correspondence. They say that it was clear from the pre-litigation correspondence that the appellants lacked sufficient detail to enumerate which activities triggered specific listed activities; that it was common cause from the correspondence that Tendele was conducting listed activities and, that Tendele ought to have denied that it was engaged in any listed activities or explained what listed activities it was undertaking. But, that is to cast a duty on Tendele that, in law, it simply did not bear.

[114] The appellants submit that Tendele ought to have supplied the allegations that were missing from the founding affidavit, because those facts were peculiarly within Tendele's knowledge. In support of this proposition, they rely on *Wightman t/a J W Construction v Headfour (Pty) Ltd and Another*.[60] But *Wightman* does not assist them. As it was put in *Wightman*, '[w]hen the facts averred are such that the disputing party must necessarily possess knowledge of them and be able to provide an answer',[61] a bare denial will not suffice to create a dispute of fact. However, as *Wightman* made plain: '[t]here will of course be

[59] *Minister of Land Affairs* fn 56 para 43.
[60] *Wightman t/a J W Construction v Headfour (Pty) Ltd and Another* [2008] ZASCA 6; [2008] 2 All SA 512 (SCA); 2008 (3) SA 371 (SCA).
[61] *Wightman* fn 60 para 13.

instances where a bare denial meets the requirement because there is no other way open to the disputing party and nothing more can therefore be expected of him'.[62] This is precisely such a situation. There was nothing to deny because the appellants did not aver sufficient facts that called for more. If anything, they were mistaken about the elements of their cause of action. In the circumstances, Tendele had no duty to supply the missing allegations.

[115] It follows that on the papers as they stand, one simply does not get to the issue of the proper interpretation of NEMA.

As to (ii)

[116] The appellants contend that Tendele is undertaking mining operations in contravention of the KwaZulu-Natal Planning and Development Act 6 of 2008 (the KZN Planning Act) and the Spatial Planning and Land Use Management Act 16 of 2013 (SPLUMA). The appellants accept that the KZN Planning Act and SPLUMA do not apply to any of Tendele's operations that occurred prior to the commencement of those statutes. They now limit their attack to mining, which they say, will occur in the future in respect of the mining right of Areas 4 and 5. In heads of argument filed on behalf of the appellants, it is contended that the use of the land covered by the Areas 4 and 5 mining right 'to commence mining would be to convert that land to a new purpose by "making use of its resources"'.

[117] The contention is unsustainable. In the first place, it was not pleaded by the appellants. As a result, the necessary factual allegations are nowhere to be found in the appellants' affidavits. Tendele was also never afforded an opportunity to respond to such a case. In the second place, the appellants' contention treats the mining that will occur in Areas 4 and 5 in the future as if unrelated to the mining

[62] Ibid.

that has occurred to date at Somkhele. As explained above, the Somkhele Mine (including the area forming the subject of the Areas 4 and 5 mining right) comprise a single mining area on Reserve No 3. Tendele's mining operations commenced on Reserve No 3 in 2006 before both the KZN Planning Act and SPLUMA commenced.[63]

[118] Be that as it may, two of the relevant local municipalities have confirmed that no planning approval or land use approval is required for the continuation of mining operations by Tendele.

As to (iii)

[119] The appellants contend that Tendele's operations are unlawful as it does not have a waste management licence for its activities as required by the Waste Act. The appellants failed to identify any aspect of Tendele's operations that would require a waste management licence. This ground of alleged unlawfulness is accordingly unsustainable on the pleadings.

[120] That aside, in terms s 20 of the Waste Act, no person may commence, undertake or conduct a waste management activity except in accordance with a waste management licence or the requirements or standards determined in terms of s 19(3). A 'waste management activity' is defined in s 1 as any activity listed in Schedule 1 or published by notice in the Gazette under s 19. Section 19 empowers the Minister by notice in the Gazette to publish a list of waste management activities. On 29 November 2013 the Minister published the list of waste management activities (the 2013 notice) that have or are likely to have a detrimental effect on the environment.[64] The 2013 notice contains transitional

[63] The KZN Planning Act commenced on 1 May 2010 and SPLUMA commenced on 1 July 2015.
[64] 'List of Waste Management Activities that have, or are likely to have, a detrimental effect on the environment GN R921, *GG* 37083, 29 November 2013.'

provisions, the purpose of which is to regularise the affairs of persons who were in the process of conducting waste management activities at the time of the publication of the notice.

[121] Regulation 7(1) of the 2013 notice provides:

'A person who lawfully conducts a waste management activity listed in this Schedule on the date of the coming into effect of this Notice may continue with the waste management activity until such time that the Minister by notice in a *Gazette* calls upon such person to apply for a waste management licence.'

Tendele's mining operations and any waste management activity that it was conducting, were being lawfully conducted in terms of its mining rights and approved EMP's at the time of the coming into effect of the 2013 notice. Tendele was therefore entitled to continue conducting such activity, until called upon by the Minister to apply for a waste management licence. The Minister has not called upon Tendele to do so.

[122] Moreover, the interdict that the appellants seek is plainly too broad in relation to the right sought to be protected. The alleged unauthorised undertaking of waste management activities in terms of the Waste Act could not possibly entitle the appellants to an interdict shutting down Tendele's entire mining operation. At best, they would only be entitled to relief in respect of a specified listed activity, assuming that such activity had been identified in their pleadings, which, as already stated, the appellants had failed to do.

As to (iv)

[123] Tendele accepts that it has previously removed or altered traditional graves, without being in possession of the necessary authorisations from the Amafa aKwaZulu-Natali Heritage Council (Amafa). It points out in its answering affidavit that it has since taken steps to rectify its past failures. Tendele details a

series of engagements between it and Amafa, which has not been meaningfully disputed by the appellants in reply.

[124] Tendele stated in its answering affidavit:

'There is no reasonable apprehension that Tendele will in future alter, relocate, damage or exhume any traditional graves without the necessary authorization from Amafa. Tendele has unequivocally committed itself to working with Amafa and the community to ensure that future relocations comply with the letter and the spirit of the law.

I am advised and accordingly submit that the [appellants'] complaints about Tendele's conduct in relation to traditional graves does not entitle them to any interdictory relief, far less an interdict against the entire mining operation at Somkhele.'

[125] As it was put in *National Council of Societies for the Prevention of Cruelty to Animals v Openshaw*:

'An interdict is not a remedy for past invasion of rights but is concerned with present or future infringements. It is appropriate only when future injury is feared. Where a wrongful act giving rise to the injury has already occurred, it must be of a continuing nature or there must be a reasonable apprehension that it will be repeated.'[65]

[126] There are no facts in this matter that would justify any reasonable apprehension that Tendele will again relocate or exhume graves without the appropriate approval. Moreover, here as well, even if the appellants' complaint were to be accepted, the alleged unauthorised removal of the traditional graves, could not possibly entitle them to an interdict shutting down the entire mining operation.

[127] In the result, I would dismiss the appeal. Tendele, commendably does not seek costs.

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[65] *National Council of Societies for the Prevention of Cruelty to Animals v Openshaw* [2008] ZASCA 78; [2008] 4 All SA 225 (SCA); 2008 (5) SA 339 (SCA) para 20.

V M Ponnan
Judge of Appeal

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