

Municipal, Tronox / Oct 2012

2.

I am employed by the abovenamed first respondent as its general manager. In that capacity I have an intimate knowledge of the Fairbreeze Mine, which is the subject of this case.

1.

I, the undersigned, NEELS OOSTERHUIS, do hereby make oath and say.

ANSWERING AFFIDAVIT

Second Respondent

UMLALAZI MUNICIPALITY

First Respondent

TRONOX KZN SANDS (PTY) LTD

and

Applicant

MTUNZINI CONSERVANCY

In the matter between:

CASE NO: 10629/2012

REPUBLIC OF SOUTH AFRICA

IN THE KWAZULU-NATAL HIGH COURT, DURBAN

Mintzhlé Tronox / Oct 2012

(a) The first is whether as a matter of law the first respondent is obliged to obtain planning permission from the second respondent for the purposes of exercising its right to mine under the mining authorisations afforded it with respect to the Fairbreeze Mine.

I am advised that this case raises two issues.

5.

Summary of the Respondent's Answer

The first respondent opposes this application and this affidavit is delivered in support of such opposition.

4.

Where I make legal submissions in this affidavit I do so on advice.

3.

The facts stated herein are within my personal knowledge save where the context indicates otherwise, or where I state the contrary. In my capacity as general manager of the first respondent I have access to the records relating to the Fairbreeze Mine.

MintzL_Tronox / Oct 20 12

As to the second question, it is the respondent's contention that this court has a discretion as to whether to grant the relief sought, and that this discretion should be exercised against the applicant. The Fairbreeze Mine is the successor to the applicant's Hillendale Mine which is nearing the end of its mine life. (The Hillendale Mine lies to the north of the Fairbreeze Mine, a little to the south of Richards Bay.) Timing is now critical. If the "stop-

8.

If the legal question is answered in favour of the first respondent then there will be no need for this court to consider the second question.

7.

As to the first issue, save for a factual error in the founding papers which I am advised does not affect the central thesis which the applicant seeks to establish, there are no disputes of fact between the parties which bear upon the legal question. (I will deal with this error of fact hereunder.)

6.

The second is whether, if the answer to the first question is in the affirmative, this court should grant the consequential relief sought by the applicant, that all work should stop on the project until such planning permission has been granted.

(b)



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Mintirel_Tronox / Oct 2012

the second issue.

The first respondent contends that in its founding papers the applicant has failed to establish a protectable interest in the relief which is the subject of

9.

to whether this Court should intervene.

appears to approach this Court, this factor has a bearing on the question as directly affected by mining. Given the basis upon which the applicant affected, the first respondent is obliged of course to rehabilitate all the land farmland. Besides having to create offsets three times the area of what is historically pristine, having been replanted. The land in question is developed relatively small affected areas of environmental significance are not imposed on either the first respondent or the community. Furthermore, the circumstances I propose to set out further in this affidavit, should not be will have considerable economic and socio-economic costs which, in the by the first respondent is not achieved. In short what the applicant proposes relatively seamless transfer of operations from Hillendale to Fairbreeze sought reason of lost production and the job losses which will be occasioned if the respondent, but will severely damage both the local and national economy by will be occasioned by that will not only cause severe loss to the first work" type order sought by the applicant is granted, then the delay which

Save where I seek to correct what appear to me to be errors in the applicant's founding papers, or where I clarify matters, most of the facts which I will state hereunder go to the second of the questions posed in this application.

10.

The first respondent's business is the production of mineral commodities. These commodities include feedstock to the pigment industry, low manganese pig iron, zircon and rutile. The first respondent's business was established and planned (in the late 1990s) based upon the availability of approved mining areas and ore bodies at Hillendale and Fairbreeze.

11.

Establishing the first respondent's business involved capital investment not only in the mining areas (Hillendale and Fairbreeze) but also in a central processing complex which is situate at Empangeni. This complex contains several different processing plants and two 36 megawatt electric arc furnaces. The overall capital investment was justified by the availability of

12.

The Fairbreeze Mine and the First Respondent's Business

ore bodies at the two mining centres, Hillendale and Fairbreeze. The decision was made to commence mining at Hillendale. (A mining enterprise has at all material times been required to hold an environmental management programme approved by the Department of Minerals and Energy Affairs. The original Environmental Management Programme dating from 1998 included both the Hillendale and Fairbreeze mines.)

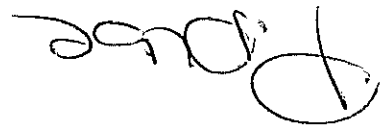
13.

It was originally intended that there would be an altogether seamless transition between Hillendale and Fairbreeze. I am advised that a detailed account of what occurred to bring about the current situation is not necessary for the purpose of these proceedings. I accordingly state simply that the acquisition of further land adjacent to the existing Fairbreeze mining area, allowing it to be expanded, altered the way in which the still planned seamless transition was to take place; but that the international recession which occurred in 2008/2009 delayed the transition.

14.

The Hillendale Mine is now nearing the end of its mine life. The effects of the 2008 recession have now diminished. The combination of those two factors brings about that the entire Fairbreeze operation can and must be brought to fruition. However the delay in the transition means that it is no

Munishi, Tronox / Oct 2012
D. D. D. D. D.



Muznihi_Tronox / Oct 2012

The Fairbreeze Mine is made up of five ore bodies which are described as
FBA, FBB, FBC, FBC extension ("FBC Ext") and FBD. I annex hereto marked

17.

I annex hereto marked "1R1" a diagram on which the line one kilometre
inland of the high water mark can be seen.

16.

The first respondent's Fairbreeze mining enterprise is directed at extracting
the heavy minerals from five ore bodies present in what are technically
described as "mineralised sand dunes". It should be clarified, however, that
these dunes are not the first dunes from the beach, but are in fact ancient
accumulations of soil situated almost exclusively more than a kilometre from
the high water mark of the sea. For the assistance of the court I state the
soil or sand in the mining area is very much like the well-known red-coloured
"Berea sand" with which the court may be familiar.

15.

longer perfectly seamless, a subject to which I will revert hereunder when
dealing with the prejudice and harm which would be caused if this
Honourable Court were to order that all work on the Fairbreeze Mine be
stopped.

"1R2" a diagram on which these ore bodies are depicted. It will be seen on annexure "1R2" that the town of Mtunzini lies to the north of the ore body known as FBC Ext and some idea of the scale of the mine can be seen by comparing it to the size of the township. The total mine area is approximately 12 km in length.

18.

The first respondent was previously named Exxaro Sands (Pty) Ltd, before that Tigor South Africa (Pty) Ltd, and before that Iscor Heavy Minerals (Pty) Ltd. In the last-mentioned name the first respondent obtained a mining authorisation from the Department of Mineral and Energy Affairs under the Minerals Act, 1991 in respect of the land upon which the ore bodies FBA, FBB, FBC and FBD are situated. This authorisation was granted in March 1998. (Mining authorisations under the 1991 Act are generally called "old order rights". Mining rights or authorisations are currently controlled under the Mineral and Petroleum Resources Development Act, 28 of 2002 ("MPRDA"), which commenced on 1 May 2004. This provides for the conversion of old order rights to new order rights. The first respondent's old order rights were converted in July 2008. To be converted the Minister had to be satisfied that the mining had commenced. She was so satisfied.)

Mtunzi, Tsonax / Oct 2012
f. D. D. D.

Muziriil_Tronax / Oct 2012

There are three properties listed in annexure "A" to the notice of motion which are described as owned by Exxaro. The first two of these (Sub 3 and Rem of Lot 91 Umlalazi 10011) are the properties upon which the ore body known as FBC Ext is situated. The annexure to the notice of motion correctly identifies that land as owned by the first respondent.

21.

As will be apparent from the founding papers the mining rights or authorisations which the first respondent holds are spread across a number of cadastral units. The land in respect of which the mining authorisation for FBA, FBB, FBC and FBD is held belongs to Mondri Limited. The shortened descriptions of these cadastral units appear in the list which is annexure "A" to the notice of motion, and can be identified as those owned by Mondri Limited.

20.

The first respondent held no old order rights with respect to the properties on which the ore body known as FBC Ext is situated. Its rights and authorisation to mine those properties were obtained under the MPRDA in April 2009.

19.

FDube

Muzini Tronox / Oct 2012

Last year, after the question had been raised (*inter alia* by the applicant) as to whether the first respondent required planning permission from the second respondent in order to conduct its mining operations at the Fairbreeze Mine, the first respondent briefed counsel for an opinion on the matter. The question as to counsel's opinion, and the timing of it, has been raised in paragraph 52 of the founding affidavit. In clarifying this issue I have no intention of waiving, and the first respondent does not waive, its privilege in respect of advice it has received from its legal representatives. The advice, to the extent that it is relevant to these proceedings, was that the first respondent did not need planning permission in respect of its mining

24.

The same goes for the last two pieces of property referred to on an annexure "A" to the notice of motion, which are a reference to certain rights held by SANRAL and Eskom. They are not party to these proceedings.

23.

The third property bearing the first respondent's former name as owner (the property described as Sarcola 16183) is indeed owned by the first respondent but is not property in respect of which the first respondent has a mining authorisation. It has nothing to do with this application.

22.



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Mtunzini_Tronox / Oct 2012

It should be noted that the area of the mine which the applicant's founding affidavit describes as being some 100 metres from the edge of the town of Mtunzini is FBC Ext, that is to say land in respect of which it was not necessary to launch this application at all.

27.

Accordingly, if the legal question in this case is answered in favour of the applicant, and this Honourable Court decides to grant substantive relief, then it would only relate to the properties which are listed in annexure "A" to the notice of motion as belonging to Mondli Limited.

26.

The first respondent informed the second respondent of this, a matter of which the deponent to the founding affidavit was aware, if for no other reason than that it was confirmed in a letter from the first respondent's attorneys to the applicant's attorneys which is annexure "H" to her founding affidavit. (See paragraph 5 of annexure "H".)

25.

authorisation on Mondli land (FBA, FBD, FBC and FBD) but did require planning permission in respect of FBC Ext.

//



Figure

Munzih, Trank / Oct 2012

A mining authorisation entails a right to enter upon the affected land, bring on the requisite plant machinery and equipment and build, construct or lay down any surface or infrastructure required for the purpose of mining. The approved mining programme relating to the Mondli land entails the performance of all of the work in what could be called the "construction phase", and details the steps to be taken in executing the mining process, and all matters incidental thereto. The mining programme includes the felling of trees, de-stumping, extraction, pumping the mineralised soil to a primary wet plant (which of course must be constructed), backfilling and rehabilitation. All of these activities comprise mining, and are necessary components of the use of land for mining purposes. Mining law requires this extent of control in order to allow for regulation at every stage, from start to finish.

29.

One of the obligations of the holder of a mining authorisation is to mine in accordance with the applicable mining work programme. The work must also be undertaken in compliance with an Environmental Management Programme which must be approved under the MPRDA.

28.



Munzhl, Tronox / Oct 2012



Minning on the original Fairbreeze Mine under the old order minning rights commenced well before section 11 of the Town Planning Ordinance was amended (with effect from 10 October 2008) to provide that for the purpose

31.

Is Planning Permission Necessary?

In the case of the land relevant to this application (i.e. the Mondli land) work (as opposed to initial planning) started in connection with the minning enterprise under the then applicable minning programme (which has subsequently been amended) in 2002 with bulk sampling, which was followed by geological drilling, clearing of certain portions of land (i.e. felling of trees), geological drilling, and so on, up to 2006. Some 9 000 tons of material was removed from Fairbreeze and processed through the Hillendale Mine. The monies expended on work at Fairbreeze up to 2006 by the first respondent amounted to approximately R104 million. (The precise figure is R103 826 706.00, but I cannot speak with such precision from my personal knowledge.) Expenditure on the Fairbreeze Mine from 2006 to date is approximately R143 million. (Some of this has been incurred in respect of FBC Ext.)

30.

amendment in 1992.

That provision of the Ordinance was, I am advised, introduced by an

34.

provision.

As appears from paragraphs 43 and 44 of the founding affidavit it is the content of the applicant that the work done before the Ordinance was amended (i.e. before 10 October 2008) required planning permission because at that time the word "development" was defined as "the erection of buildings or the use of land without sub-division for non-agricultural purposes". According to the applicant mining fell within the scope of that

33.

The applicant was informed of this contention (see paragraph 41 of the founding affidavit) and has correctly not sought to contradict it.

32.

of that section mining would be included within the meaning of the word "development", as a result of which the "planning" authorisation of the responsible Member of the Executive Council was required.



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Mtshunzi, Trevor / Oct 2012

It is obvious that when the Ordinance was amended in 2008 the purpose was, *inter alia*, to introduce a requirement of planning consent with respect to mining. That amendment reflected the Provincial Government's appreciation of the fact that without the amendment there was no law in this province regulating mining from a planning perspective. That appreciation

37.

The first respondent contends that if the Ordinance as it was introduced in 1992, and existed until October 2008, is read to include "mining", then at least until the commencement of the MPRDA on 1 May 2004, the Ordinance would have been in conflict with the National Legislation which regulated mining. Mining was regulated solely by National Legislation. In the circumstances it must be accepted that seen in context, there was no legislative intent at Provincial level in 1992 to require approval of mining under section 11 of the Ordinance.

36.

I am advised that in 1992, and thereafter until the introduction of the MPRDA, mining authorisations permitted the conduct of mining (and all matters incidental thereto) without planning permission, whether it be planning permission at provincial or local government level.

35.

Municipal Tribunal / Oct 2012

"Applications for mining outside the area of a scheme has been required since 10 October 2008 when the definition of 'development' in the Town Planning Ordinance, 1949 (Ordinance No. 27 of 1949) was amended to include 'mining'."

reads as follows.

When in mid-2011 the question of planning consent again raised its head, a request was apparently directed by a Mr Hennie Smit of the Uthungulu District Municipality (within the area of which the second respondent and the Fairbreeze Mine are situated) to the provincial authorities, which generated a response from a Mr Gert Roos, who I am advised is a well-known employee of legal services at Provincial Government level, and is closely involved in planning law. A copy of his e-mail response (which was copied to the first respondent) is annexed hereto marked "1R3". In its opening paragraph it

38.

operations.

was reflected in the letter addressed by the Kwazulu-Natal Provincial Government to the first respondent in February 2006 (annexure "B" to the founding affidavit) which recorded that no development permission was required in terms of the Town Planning Ordinance to 'conduct mining

Munzill, Tironoz / Oct 2012

Mining work as contemplated initially by the Minerals Act, 50 of 1991, and subsequently by the MPRDA, took place and commenced on Fairbreeze well before October 2008. Although the mining plan for Fairbreeze has not changed, the business plan, order and pace of pursuit fluctuated, as is in the nature of mining enterprises. When the Ordinance was amended in October 2008 to introduce the notion that "mining" equated to "development", and therefore required planning permission, the first respondent's mine on the Mondl land (i.e. under the mining authority relating to FBA, FBB, FBC and

40.

The first respondent did not require and did not have (and still does not have) planning permission for the Hillendale Mine, despite the fact that it was established well after 1992. As far as I know, consistent with the views expressed in annexure "B" to the founding affidavit and in annexure "1R3" hereto, planning permission has not been granted in KwaZulu-Natal in respect of mines, certainly not prior to October 2008.

39.

However I am advised and submit that both the Ordinance as amended on 10 October 2008, and the current provincial legislation, did not and do not require permission in respect of an existing use. Neither provision was retrospective or retroactive.



Mituzhi, Tenox / Oct 2012

As I have attempted to explain above, whereas it was originally contemplated that there would be a seamless transition from Hillendale to Fairbreeze, which meant that there would be an overlap in mining operations ensuring that the central processing plant in Empangeni was not deprived of its feedstock, the delays caused by the recession of 2008 have brought about that there will be an 18 month long "production gap" between supplies from Hillendale stopping, and the supply of feedstock from Fairbreeze commencing. The mining plan involves the removal of the plant used at Hillendale (I have in mind in particular the plant known as the "Primary Wet Plant") to Fairbreeze, and its installation there. The mining plan for

41.

The Current Position at Fairbreeze, and the Question of Prejudice

(FBD) was already underway and an established use of the land. Accordingly no planning authority was necessary. (That is not the case with respect to FBC Ext, because although certain mining related work was done there prior to October 2008, it was not done in compliance with a mining authorisation, which came later, as a result of which the first respondent accepts that such work cannot be regarded as part of the mining enterprise to which the subsequently obtained mining authorisation related.)

Ministry of Energy / Oct 2012

It is proposed to support production at the central processing facility during the gap period with ilmenite stockpiles, and ilmenite imported from various sources at a cost of about three times that of the product of the first respondent's Hillendale mine. However the Hillendale mining workforce as

43.

ore body known as FBC.

be extracted in 2015, and that extraction will commence on the sequence of mining, which illustrates that the first product will

(c)

and

the second phase of construction which involves certain dams;

(b)

(which has just commenced);

the first construction phase under the optimised mining plan

(a)

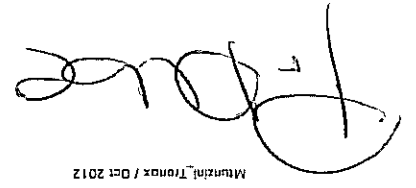
which is annexure "1R1", which shows

The order of things can be seen by examining the legend on the diagram

42.

construction phase which will endure for two years.

Fairbreeze has been optimised to accommodate a newly developed



Muirhill, Tomaz / Oct 2012



(a) The production gap of 18 months is going to impact directly on the first respondent. It will seek to minimise its loss by reducing the number of contractors. But as long as the programme (the broad outline of which appears on annexure "1 R1") is maintained, as I have said there will be no retrenchments of permanent staff.

46.

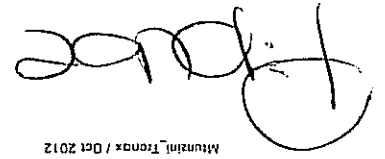
The first respondent currently provides approximately 750 permanent labour positions. As at the end of September 2012, 685 of these were filled permanently. The work associated with the remaining permanent positions is currently covered by contractors. There are approximately 300 contractors who work for the applicant, covering permanent positions and other roles.

45.

The first respondent has taken a decision that it will not retrench its permanent labour force during this production gap, but will attempt to ameliorate the harm by reducing contractor numbers.

44.

well as a percentage of the workforce at the central processing facility will not be fully utilised during this period.



The business case upon which this course has been plotted is stretched to the limit, but it is achievable. If a delay is imposed, such as is contemplated by the substantive relief sought by the applicant, there will be severe consequences. The extent of delay can, I am advised, be assessed by considering the provisions of the KwaZulu-Natal Planning and Development Act, and the applicant's record of obstruction at every turn, which it clearly intends to maintain without blemish, and without any regard for the consequences for others.

47.

(c) I mentioned earlier the costs already incurred at Fairbreeze. To give some idea of the scale of the project which the applicant asks this court to suspend, I state that the estimated cost to complete the two year construction phase is R2,3 billion. I am not able presently to provide an estimate of the cost to the first respondent occasioned by disruption and inflation which will be incurred if the work is suspended. It will obviously be significant.

(b) However it is important to note that even if the current plan is maintained, there is a significant negative impact on contractor employment, on revenue, and on service providers to the first respondent's business, including their employees.

plouze

Munzhl, Tironx / Oct 2012

It seems clear that if the substantive relief sought by the applicant is granted negotiations will have to be initiated with the Unions almost immediately.

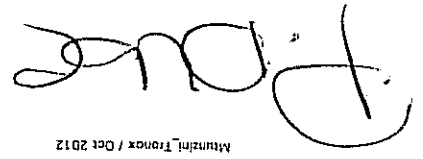
50.

Based on current ilmenite furnace feedstock supply available, if a delay in excess of six months occurs one of the furnaces at the Central Processing Complex will have to be shut down. If one furnace is shut down it is estimated that another 150 permanent employees may be affected. In that event there will also be further harm to the first respondents service providers.

49.

The present estimate is that if the construction phase must be suspended for between one month and six months, there will be further job losses and the risk of the retrenchment of approximately 300 permanent employees and 100 contractors. In addition, of course, there will be further negative impacts on service providers.

48.



light of, *inter alia*,

relief sought by the applicant, suspending the construction activities, in the made this application, it would not have been entitled to the substantive respectfully submitted that even if it was the second respondent which had otherwise then, planning permission would have been sought then, it is authority under the then applicable legislation. If the government had said wrong in informing the first respondent that it did not require planning

the Mondli land during and before 2006, the Provincial Government was Honourable Court that when the mining activities were being undertaken on respondent finds itself will be a direct consequence of a finding by this necessary in respect of the Mondli land, then the situation in which the first If this Honourable Court should hold that planning permission is in fact

53.

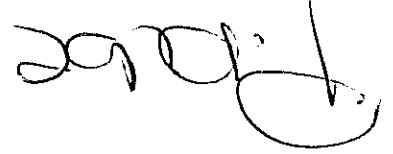
right to proceed on the Mondli land without planning permission.

However, as I have stated, it is the first respondent's contention that it has a

52.

that the first respondent requires planning consent in respect of that land. the land on which the ore body known as FBC Ext is situated. It is correct It will be noted that none of the work in the construction phase impinges on

51.



MünzHL, Trautz / Oct 2012



(a) The first respondent does not dispute that under the current law a new mining development requires planning approval.

55.

It is respectfully submitted that there is even less reason for this Honourable Court to make an order suspending the works at the behest of the applicant.

54.

(d) the first respondent's willingness to continue the construction phase at risk whilst what might be called a remedial planning application is made.

(c) the complete absence of any evidence for the proposition that a planning application is likely to fail; and

(b) the State's responsibility for the current situation;

(a) the economic and socio-economic harm caused by such an order;

House
Muirhill, Troxax / Oct 2012

Ad paras 1 and 2



57.

I now deal directly with the contents of the founding affidavit to the extent that it is necessary to do so in the light of what has been stated above.

56.

The First Respondent's Answer to the Founding Affidavit

(b) However the founding papers in this application, as well as a reading of the Provincial Act, may convey the impression that the planning mandate afforded local government with respect to mining occupies a central position, and is extremely wide in scope.

(c) However the planning mandate given to local government must be seen within the wider regulatory framework which governs mines. There are a myriad of authorisations and regulatory controls which must be obtained and complied with. In order to illustrate the point I annex hereto marked "1R4" a list of approvals relative to the Fairbreeze project which place the current situation in a clearer context.



Ad para 10
There is no "harm" which the applicant apprehends. Having said that, the first sentence in this paragraph is correct and the first respondent accepts that this Honourable Court has jurisdiction in this matter.

61.

Ad paras 8 and 9
It is denied that the applicant is entitled to the orders it seeks.

60.

Ad paras 4, 5, 6 and 7
These allegations are not disputed.

59.

Ad para 3
The extent to which I do not accept the first sentence of this paragraph as correct appears from this affidavit.

58.

These allegations are not disputed, although I have no particular knowledge of the authority of the deponent. She has presented none.



65.

I have already described how changes in circumstances required an amendment to the programme. It has been granted.

Ad para 12.2

64.

- (a) Mining itself is not a listed activity under NEMA.
- (b) However certain activities proposed to be undertaken as part of the mining operation do require NEMA approval and it has been obtained.

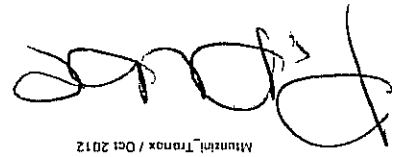
Ad para 12.1

63.

The allegations herein are denied to the extent that they are inconsistent with what has already been stated in this affidavit. Mining work commenced much earlier on the Mondli land, and no such work was undertaken in conflict with any law relating to authorisations.

Ad para 11

62.



Mintzini_Tronox / Oct 2012



(a) The northern extremity of FBC Ext is the closest point to the Mtunzini town. To the best of my knowledge and belief it is a little more than 100 metres from the town edge. As can be seen from annexure "1R1", according to the programme extraction in

Ad para 14

67.

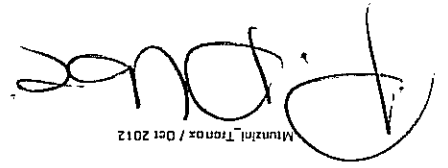
As already stated, the second respondent's planning approval in respect of FBC Ext must still be obtained, but it is not necessary for the original extent of the Fairbreeze Mine (i.e. the Mondiland) which is governed by a separate mining authorisation.

Ad para 12.4

66.

The question of permissions with regard to water use are complex and a full account of them would take some explanation. The first respondent has certain authorities already. Paragraph 1.3.1 of annexure "1R4" hereto identifies the licence still required. None of the construction works currently underway is affected by the fact that the licence in question is not yet granted.

Ad para 12.3



I have already dealt with the question of water use.

Ad para 17

69.

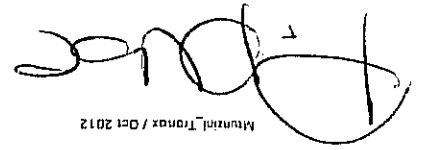
The deponent again makes the mistake of classifying the environmental authorisation as authorising "the Fairbreeze Mine". Authorisation of the mine is a competence held by the Department of Mineral Resources, and that authorisation has existed for many years. Save as aforesaid these allegations are not disputed.

Ad paras 15 and 16

68.

(b) Subject to what I have already said about the scope of approval under NEMA, the further allegations made in paragraph 14 are correct. The NEMA approval was granted and it is apparent that the applicant intends to pursue its obstructive course by appealing the decision. But the appeal does not have the effect of suspending the authorisation.

that area is only due to take place in 2020. The earliest extraction from FBC Ext is due to take place at the other end of the ore body in 2017.



Munziel_Tronox / Oct 2012

The allegation implicit herein, that land use or planning approval is required in respect of the Mondli land, is of course denied. It is unclear why in this paragraph (and in others) the deponent fails to distinguish the land upon which the ore body known as FBC Ext is situated, given that she is aware of the fact that the first respondent is applying for such permission in respect of that land.

Ad para 20

72.

These allegations are not disputed.

Ad para 19

71.

These allegations are not disputed. However the registration of the applicant as an "affected party" does not mean that in law it holds or maintains an adequate interest to obtain relief, certainly in respect of the original extent of the Fairbreeze Mine on Mondli land.

Ad para 18

70.



(b) With regard to what is said in paragraph 26, it should be observed that none of the land in question is "zoned".

(a) The provisions of section 11(6) of the Ordinance prior to its amendment with effect from October 2008 should be added to the deponent's account of legislative provisions.

Ad paras 22, 23, 24, 25 and 26

74.

(b) The first respondent's answer was that all planning authorisations actually required by the Planning Act would be applied for. Implicit in that was that planning authorisations not required would not be sought.

(a) This paragraph is characterised by hyperbole. Nevertheless it is correct that during the course of the environmental assessment process the applicant raised a query as to whether planning approval was necessary. But it is not correct that the first respondent answered as set out in this paragraph.

Ad para 21

73.

I set out below a table listing the areas directly impacted by the mining activities at Fairbreeze. (The table reflects the entire operation, not merely the initial construction phases.) This information was available to the deponent and the applicant by virtue of its participation in the NEMA process.

- (a) Prior to the commencement of mining activities at Fairbreeze, which includes activities incidental thereto, the deponent's statement is correct. The land was farm land, used principally for sugar farming and commercial forestry. The disturbance of these activities has been and will continue to be progressive, but after rehabilitation agriculture in an appropriate form may be resumed.
- (b) The allegations in paragraph 27 are simply irreconcilable with the contents of paragraph 60 of the founding affidavit.
- (c)

Ad para 27

75.

Municipal_Tionox / Oct 2012

(a) Insofar as the response from the municipality is concerned, it appears that the official responsible for it was under the impression that the entire Fairbreeze Mine fell to be dealt with as a so-called "greenfields project". That is of course not correct.

Ad paras 30, 31, 32, 33, 34, 35 and 36

77.

Whilst I have no knowledge of precisely what the applicant has been about in seeking clarity with respect to what it calls "zoning rights", as appears above it is not disputed by the first respondent that planning approval at provincial level has not previously been obtained.

Ad paras 28 and 29

76.

	Ha	%
Vacant (Roads, fire breaks and other)	86	6%
Swamp forest impacted	13	1%
Wetlands impacted	57	4%
Low Biodiversity Sensitive area (Degraded wetland)	143	10%
Commercial Forestry impacted	956	68%
Sugar Cane production area impacted	155	11%
Total project footprint	1410	

Mituzhik, Treoux / Oct 2012

(b) What the first respondent conveyed at the meeting was that it intended to commence with the early works associated with the construction phase under the mining plan.

(a) Jan Boukes, the first respondent's client manager, attended the meeting.

Ad para 37

78.

(d) It is not disputed that correspondence was addressed to the first respondent's attorneys as alleged.

(c) To the best of my knowledge the second respondent is taking its own advice on this question, which may or may not be reflected in its participation in these proceedings.

(b) The first respondent has conveyed to the second respondent why it is that the first respondent contends that in respect of the mining authorisation relating to the Mondl land no planning approval is required.

(f) However, and having said that, the first respondent agrees that the resolution of the legal issue as to whether planning permission is required for the Mondli land is extremely urgent. If, contrary to the first respondent's contention, such planning permission is required, the application for it must be made immediately. (This

of urgency in this matter.

(e) It accordingly ought to have been quite apparent to the applicant that the commencement of this work could hardly justify its claim

power point presentation.

(d) The location of the works was disclosed at the meeting through a

Mtunzini.

(c) Some R26 million has been allocated to this phase which should be complete by February next year. It involves the construction of a link road between the N2 highway at the planned off-ramp for the site, and the creation of a platform for the primary wet plant which is to be eventually moved from Hillendale to Fairbreeze. I annex hereto marked "1R5" a copy of two diagrams depicting the location of the works. It will be seen that they lie more or less in the middle of the mining area at a considerable distance from Mtunzini.

House

Atunzi/Tironx / Oct 2012

As to the second sentence, it is clear that when in 2006 the Provincial Government informed the first respondent that it did not require planning approval in terms of the Ordinance, the intention

(b)

The allegations made in the first sentence of this paragraph are

(a)

correct.

Ad para 45

81.

As already stated the first respondent submits that the applicant misinterprets the legislation, and that the stance adopted by the Provincial Administration was correct.

Ad paras 43, 44, 46 and 47

80.

The exchange of correspondence is admitted.

Ad paras 38, 39, 40, 41 and 42

79.

the substantive order sought by the applicant.)
observation applies whether or not this Honourable Court grants

Munzill_Tronox / Oct 2012

The allegations made herein are denied. It is submitted that the applicant is mistaken in its contention that because it is entitled automatically to register itself as an "interested and affected party" in administrative processes, it thereby acquires *locus standi* to seek relief from the court. As a matter of fact it has no interest (material or otherwise) in the commencement of mining activities. What is being done at present does not affect any legitimate interest of the applicant, although the position with regard to FBC Ext may be different. But the applicant knew when it launched this application that the first respondent accepts that it must apply for planning permission in order to exercise the rights afforded it under the mining authorisation relating to the ore body known as FBC Ext.

Ad para 48

82.

was in effect to permit the applicant to proceed under its mining authorisation. It may be argued that the effect was an exemption under the Ordinance. However if, as the first respondent contends, at the material time the Ordinance did not require planning permission for mining, the question does not arise.

[Handwritten signature]
Mintzer, Tenzel / Oct 2012

[Handwritten signature]

to advance.

and in pursuit of the interests which it claims to have been formed says it has the right to approach this court in the public interest which are allegedly to be infringed, and with respect to which it made little or no attempt to identify the environmental rights I respectfully draw attention to the fact that the applicant has

(c)

(MPPRA.)

authorisation, and is considering the same course under the applicant is exercising a right of appeal against the NEMA been unsuccessful. (As is apparent from the founding papers the environmental rights, both under NEMA and the MPPRA. It has the administrative processes directed at the protection of construction. It has been afforded a hearing in connection with it has no material interest affected by the commencement of However, even if the first respondent technically has *locus standi*,

(b)

this paragraph.

The first respondent does not accept the contentions advanced in

(a)

Ad para 49

(e) Under the peculiar set of circumstances which obtain in this case, it is submitted that the first respondent's expressed willingness to apply for planning permission in respect of the mining authorised on the Mondli land if this Honourable Court should determine that such planning permission is necessary, constitutes a complete answer to the applicant's complaint that planning permission has not been sought. If this court declares that such planning

(d) The land in question is agricultural land, and it will be progressively restored as mining proceeds. To the extent that the activities have engaged this country's environmental laws, the NEMA process has addressed that, and the applicant still enjoys its right of appeal which the applicant has employed (and has threatened to employ insofar as the environmental management programme under the MPRDA is concerned) to defend its environmental interests. It is submitted that it has no right to engage the court on this subject as well; and that this application is a ploy designed to circumvent the national legislation governing these environmental matters which provides that the existence of an appeal does not suspend the operation of the decisions concerned.

Munzhl_Tronox / Oct 2012

(a) These allegations are denied. As I have already said, counsel's opinion was obtained at the end of 2011.

Ad para 52

85.

In the light of what I have said, the allegations made herein are denied.

Ad paras 50 and 51

84.

(f) But there is no reason why this court should, at the request of the applicant, bring the construction phase of the Fairbreeze Mine to a standstill in order to protect the barely disclosed environmental interests which the applicant says will be harmed if construction proceeds in the meantime, especially bearing in mind that the applicant continues to employ and have available existing administrative procedures which are finely tuned to address environmental issues.

the process.

permission is necessary the applicant will obviously participate in

that all the specialised authorities it has engaged thus far in
intransigent attitude adopted by the applicant, despite the fact
As to the remainder of the paragraph it speaks volumes about the

(b)

denied.

The allegations made in the first sentence of this paragraph are

(a)

Ad para 53

86.

attorneys that the present application would be launched.
by the applicant's attorneys, who informed the first respondent's
opposition. The answer to the second question was pre-empted
The answer to the first question was in the negative. Thus this

(c)

planning by launching an application for a declaratory order itself.
whether the first respondent should seek finality on the issue of
counsel's earlier expressed views; and on the question as to
(referred to in paragraph 26 of the founding affidavit) affected
judgment of the Constitutional Court in the case of *Maccsand*
annexure "G", was simply on the question as to whether the
The advice sought from counsel in September 2012, referred to in

(b)

Mitsubishi_Tronox / Oct 2012

are accordingly false.

requires full rehabilitation. The allegations made in this paragraph to the full extent contemplated by the mining plan, the plan land is obviously reversible; after all, even if mining is completed phase substantially alters such a landscape. The situation on the it is simply wrong to say that commencement of the construction

(b)

The land on which the ore bodies are contained is more than 4 000 hectares in extent, although a substantially lesser extent will be used for mining. (See the table earlier in this affidavit.)

(a)

Ad para 54

87.

lawful use of land.

development plan containing provisions which ignore an existing such as the second respondent to prepare an integrated I respectfully point out that it is not competent for a municipality

(c)

ruled that mining can proceed.

connection with what the applicant claims to be its interests have

Mirunal Tripathi / Oct 2012

Ad para 56

(a) The allegations made in the first sentence are denied for reasons already given.

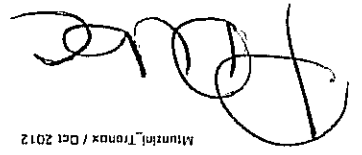
(b) As to the second sentence, the second respondent has not taken "prompt action" because it has now realised that it was deprived of a full account of this matter when it wrote the letter which is annexure "C" to the founding papers.

(c) It is denied specifically that the absence of action by the second respondent affords the applicant the right to approach this Honourable Court for the substantive relief which the applicant seeks.

43

The first respondent has not been asked to answer a claim for interim relief. Nevertheless it is denied that there is any balance of convenience in favour of the applicant at all. The denial of the substantive relief it seeks causes no discernible harm to the applicant.

Ad para 57



Mintzhl, Tonnax / Oct 2012



regard to the first respondent's mining enterprise,
which motivates the applicant's persistent obstructive tactics with
Mine), it is denied that there is any altruistic or philanthropic intent
(other than in connection with the first respondent's Fairbreeze
Whatever intent may motivate the applicant's other activities (b)

"blatant and persistent" or otherwise.
"disregard for the law" involved in the first respondent's conduct,
I submit that it has been illustrated in this affidavit that there is no (a)

Ad para 59

91.

The contents of this paragraph make no sense at all. Annexure "C" records
in paragraph 2 that the visit by the first respondent's planning consultant on
22 February 2012 was to discuss the technical requirements of an
application for planning permission in respect of FBC Ext. At the risk of
repeating myself, there was no dispute when this application was launched
about the need to apply for planning permission in order to exercise the
mining rights afforded under the mining authorisation relating to FBC Ext.

Ad para 58

90.

44

(b) Insofar as the allegations in paragraph 60(b) are concerned, they are false and have been proven false by reason of the decisions made by the specialist bodies whose task it is to adjudicate on

(a) I have already indicated that the first respondent accepts that this matter is urgent, but not for the reasons advanced by the applicant.

Ad para 60

92.

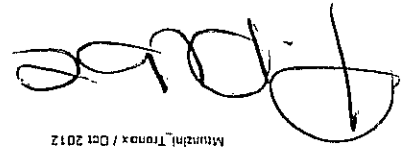
(c) The applicant's continued employment of obstructive tactics, characterised by a complete disregard of the wider economic and socio-economic consequences of the Fairbreeze Mine Project not proceeding, coupled with the applicant's refusal to accept the decisions of specialist bodies with regard to the matters it has raised, render it difficult to resist the conclusion that the applicant's activities in connection with the Fairbreeze Mine are motivated by the personal preferences of its prominent members rather than by the objects for which the applicant was formed as an association.

these issues. I believe that I have illustrated that the deponent's complaints about effects on "extensive areas of wetland and indigenous forest" and such matters are the grossest exaggeration. The Mondli forests are of course not indigenous at all.

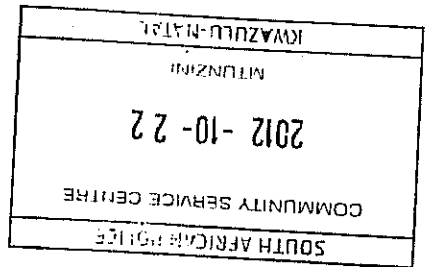
(c) Every conceivable environmental impact has already been

considered and where necessary addressed in the processes which generated NEMA approval, and the current Environmental Management Programme sanctioned under the MPRDA. (The MPRDA has as one of its objects the fulfillment of rights under section 24 of the Constitution.) The applicant has already been heard on them. In particular the potential impacts on Mtunzini have been scientifically analysed and found not to be an obstacle to the mining enterprise. Obviously mining FBC Ext is the dominant factor in this regard and it has already been fully considered.

(d) The allegations made in sub-paragraph 60(c) are denied.

Mtunzini, Tlokozi / Oct 2012



COMMISSIONER OF OATHS

Handwritten signature and name: Hester

I HEREBY CERTIFY that the deponent has acknowledged that he/she KNOWS and understands the contents of this affidavit which was SIGNED and SWORN TO before me at *CRIS8 Mtunzini* on this *22* day of *October* 2012, the Regulations contained in Government Notice No. R1258 of the 21st July 1972 as amended by Government Notice No. R1648 of the 19th August 1977, having been complied with.

NEELS OOSTERHUIS

Handwritten signature of Neels Oosterhuis

The first respondent humbly prays that it may please this Honourable Court to dismiss this application with costs, including those consequent upon the employment of two counsel.