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IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL DIVISION, PIETERMARITZBURG

CASE NO. **11488/17P**

In the matter between :

GLOBAL ENVIRONMENTAL TRUST	FIRST APPLICANT
MFOLOZI COMMUNITY ENVIRONMENTAL JUSTICE ORGANISATION	SECOND APPLICANT
SABELO DUMISANI DLADLA	THIRD APPLICANT

and

TENDELE COAL MINING (PTY) LTD	FIRST RESPONDENT
MINISTER OF MINERALS AND ENERGY	SECOND RESPONDENT
MEC : DEPARTMENT OF ECONOMIC DEVELOPMENT, TOURISM AND ENVIRONMENTAL AFFAIRS	THIRD RESPONDENT
MINISTER OF ENVIRONMENTAL AFFAIRS	FOURTH RESPONDENT
MTUBATUBA MUNICIPALITY	FIFTH RESPONDENT
HLABISA MUNICIPALITY	SIXTH RESPONDENT
INGONYAMA TRUST	SEVENTH RESPONDENT
EZEMVELO KZN WILDLIFE	EIGHTH RESPONDENT
AMAFA aKWAZULU-NATALI HERITAGE COUNCIL	NINTH RESPONDENT

GRIFFIER VAN DIE HOOGGEREGSHOF VAN S.A.
NATALSE PROVINSIALE AFDELING
PRIVAATSAK/PRIVATE BAG X9014
2018 -12- 11
PIETERMARITZBURG, 3200
NATAL PROVINCIAL DIVISION
REGISTRAR OF THE HIGH COURT OF S.A.

NOTICE OF APPLICATION FOR LEAVE TO APPEAL

KINDLY TAKE NOTICE THAT the Applicants will apply to the above honourable Court, on a date to be arranged with the Registrar, for leave to appeal to the Supreme Court of Appeal, against the whole of the judgment and order handed down by his Lordship Mr Justice Seegobin on 20 November 2018 under the above case number, including the order of costs.

KINDLY TAKE NOTICE THAT the grounds on which the application for leave to appeal is made are as follows:

1. The learned Judge erred in stating (in paragraph 4 of his judgment) that the Mfolozi Community Environmental Justice Organisation has 530 membership as, had the learned judge considered the applicants reply to the amicus papers, he would have seen that the membership had increased to 2 528 members (in paragraph 4 of DLADLA affidavit) with more people joining every day.

2. The learned judge erred in finding (in paragraph 8) that the applicants did not raise "any real objections" to the application of the amici. The objections were set out in detail in the applicants' reply. The Judge ought to have considered them and give the applicants counsel the opportunity to argue them in Court.

3. The learned Judge erred in quoting directly from the Amicus papers (in paragraphs 28, 30, 32, 33, 34, 35 38) in his judgment and using the information contained therein to inform his findings. The applicants case is based on section 24 of the Constitution coupled with non-compliance with relevant legislation. The Amici failed to address any of these issues and all the facts contained in the papers should have been struck out. At the hearing the Applicants were not given the opportunity to state their case as the Amici had failed to file their Heads of Argument timeously and barely addressed the court. Notwithstanding this, the learned Judge did consider the Amici application papers but further erred in failing to

consider Amicus papers put forward by the Applicants in response. These included the South African Human Rights Commission Report on mining affected communities, including those in Somkhele, the ActionAid audit on the Tendele Social and Labour Plan (which shows substantial inconsistencies with the allegation of Tendele) and the Psychosocial Impact Assessment by Professor Edelstein. Had the learned Judge considered these submissions, he would not have quoted from the amicus papers and the affidavit of Mr Du Preez verbatim (at paragraphs 34, 35, 36, 37, 38, 39 and 40) as a matter of fact.

Issues of Law:

4. The learned Judge failed to consider all the relevant legislation (in paragraph 19 of his judgment) in leaving out the NEMA EIA Regulations of 2006 and 2010 as well as the Environment Conservation Act, 1989 (and relevant regulations), and the waste management activities listed under the National Environmental Management: Waste Act 59 of 2008 (NEMWA) in Government Notice 718 of 3 July 2009.

5. The learned Judge erred further in finding (in paragraphs 50 – 56 and paragraph 71.7) that prior to 8 December 2014 the environmental impacts of mining were regulated exclusively through the MPRDA, 2002.

6. The learned Judge ought to have held that the MPRDA and NEMA worked concurrently prior to 2014 and a mining right application (with EMP) had to be applied for at the same time as an environmental authorisation in terms of NEMA for activities associated with mining. The one environmental management system came into being to streamline the two processes – in other words, to do away with the parallel processes and make them one.

7. The learned Judge should have found as the learned Judge Rogers, J. held in the Mineral Sands judgment delivered on 20 March 2017at paragraph 8:

[8] The Listing Notices identify the competent authority for granting the environmental authorisation. Prior to 8 December 2014 the competent authority for granting environmental authorisations in the Western Cape was the DPWC unless the activity was of a kind described in s 24C(2), in which case the competent authority was the Environment Minister. Mining as such was not a listed activity. However a company intending to embark on mining would typically have had to perform activities which were listed activities (eg establishing infrastructure for the bulk transportation of water; facilities for the storage of fuel; clearing indigenous vegetation covering more than 1 ha etc) and would thus have needed environmental authorisation for those activities in terms of s 24 of NEMA. (our emphasis)

And at paragraph 20:

[20] Regulations 48-52 of the Mining Regulations prescribed how the environmental impacts of mining were to be assessed and the requirements for a Mining EMP. As in the case of activities identified in NEMA Listing Notice 2, the applicant was required to submit a scoping report for approval, followed by an EIA report. There are some differences between the NEMA procedure and the mining procedure. For example, the NEMA EIA Regulations require a public participation process both in relation to the scoping report and the EIA report whereas the Mining Regulations required a public participation process only in relation to the EIA report. There are other differences, the EIA Regulations generally being more detailed.

Mineral Sands Resources (Pty) Ltd v Magistrate, Vredendal Kroutz N.O. [2017] 2 All SA (WCC) also at para [22]

8. The learned Judge failed to apply his mind to the implicit activities that are necessary to mine coal, particularly in a mine the nature and magnitude of Tendele. All this is evident in the various EMPs of Tendele (the cover pages only of which were put up as annexures to their reply).

9. The learned Judge ought to have found as the learned Judge Davis, J. found in his judgment handed down 8 November 2018 in the matter regarding the Mabola protected area[1]. At paragraph 4.11 of the judgment the learned Judge Davis, J. held:

In order for a party to conduct mining activities, it must have obtained the following authorisations:

4.11.1 A mining right in terms of section 23(1) of the MPRDA;

4.11.2 The approved environmental management programme ("EMPRS" in terms of section 39 of the MPRDA;

4.11.3 An environmental authorisation for listed activities in terms of section 24 of NEMA;

4.11.4 ....

4.11.4 Permission for a change in land-use for the properties ...in terms of section 26(4) of the Spatial Planning and Land Use Management Act 16 of 2013.

Mining and Environmental Justice Community Network SA v Minister of Environmental Affairs and Others Case No. 50779/2017 delivered 6 November 2018

10. The learned Judge erred in finding (in paragraph 68-69) that the applicants made no attempt to identify the activities associated with mining. The activities in annexure R1 identify the activities that would ordinarily be associated with mining operations (a complete list of the Listed Activities promulgated over the course of 10 years would have been a far longer list). It is also impossible for the applicants to have stated it in more specific detail given that no applications were made for the listed activities and the applicants do not have access to the internal operations of the First Respondent.

[1] Mining rights were obtained prior to the one environmental management system coming into play and environmental authorisation was applied for (and granted) in terms of NEMA in this case. The North Gauteng High Court set aside the 2016 decisions of former Mineral Resources Minister Zwane and the late Environmental Affairs Minister Molewa to permit a new coal mine to be developed in the Mabola Protected Environment near Wakkerstroom, Mpumalanga.

11. The learned Judge erred in finding that (paragraph 70) section 12 of the NEMA Amendment Act, 2008 applies. Section 12 simply states that the EMP remains approved, it does not state that it becomes an Environmental Authorisation in terms of NEMA and it is an error to find that it does become so.

12. The learned Judge ought instead to have found as the learned Judge Rogers, J. found in his judgement at paragraph 31-32:

[31] The expression 'that Act' in s 12(7) is a reference to the Mining Act. The 'date referred to in section 14(2)(b)' of Act 62 of 2008 is, on a literal interpretation, the date on which Act 49 of 2008 came into force, namely 7 June 2013, but I agree with the respondents' submission that what was intended was a date 18 months after 7 June 2013, namely 8 December 2014. There was some debate as to whether s 12(7) would include an application in terms of s 102 of the Mining Act to amend a Mining EMP. If s 12(7) applies to an application to amend a Mining EMP, the effect of s 12(7) would be that such an amendment application, pending as at 8 December 2014, would have to be finalised in terms of the Mining Act without reference to the fact that with effect from 8 December 2014 the provisions in the Mining Act dealing with Mining EMPs were deleted.

[32] A narrower interpretation would be that s 12(7) is concerned only with applications for mining rights and mining permits. If such an application is pending as at 8 December 2014, it must be finalised without reference to the amendments made to the Mining Act with effect from 8 December 2014. This would mean that the applicant would only need to satisfy the provisions in the unamended Mining Act dealing with environmental assessments and Mining EMPs; the applicant would not have to embark on a fresh environmental process in terms of NEMA as amended. As I explain later, this in my opinion is the preferable view.

13. The learned Judge should also have found after reading the following extract from the Companion Guideline on the Implementation of the Environmental Impact Assessment Regulations, 2010 which was

presented in annexure R1 of the applicants' replying affidavit, in which the erstwhile Minister of Water and Environmental Affairs explicitly states that mining activities require environmental authorisation under NEMA where they trigger listed activities even though they may already hold mining licences under the MPRDA:

"Note: There was a guideline gazette for these 2010 listed activities on 10 October 2012 which states:

"Mining

- *Authorisations or permits (e.g. for a water permit, mining or prospecting license or township establishment) obtained under any other law for an activity listed or specified in terms of that law, does not absolve the applicant from obtaining authorisation under NEMA.*

- *Activities listed under GNR 544, 545 and 546 requires environmental authorisation from the CA, even within a proclaimed mining area or for mining purposes and even in the event where a mining permit has been issued by DMR. The date of proclamation bares no relevance (if proponent has obtained permits 20 years ago, should they today i.e. construct a road that road would/may be unlawful in terms of certain activities CA). If a proponent undertakes a listed activity without due environmental authorization this would constitute an offence. Authorization obtained from another authority (DMR for example) is not granted in terms of the EIA regulations. Section 24(8) of NEMA confirms this by stating that authorizations or permits obtained under any other law for an activity listed or specified in terms of that law does not absolve the applicant from obtaining authorization under NEMA.*

- *The activities listed for mining & prospecting specifically in GNRs 544 and 545 are not presently (on the date this guideline was published) enacted. However, should any of the enacted listed activities be triggered, environmental authorization (in terms of GNR 543) is indeed required. For mining, a number of activities in GNR 544,545 and 546 could potentially (and is most often the case) be triggered.*

- *Although the activities related to prospecting and mining will only be enacted at a later stage, any other activity listed (in any of the 3 listing notices) as a result of the proposed prospecting or mining will still require an environmental authorization in terms of these regulations. In an event where both the MPRDA and NEMA EIA regulations are triggered by e.g. a mining activity, both processes must be followed".*

14. In reading the Transitional Provisions (set out in paragraph 70 of the judgment) the learned Judge failed to consider Regulation 54A of the EIA Regulations[2] where the transitional provisions are set out as follows:

(1) Where, prior to 8 December 2014-

a. environmental authorisation was required for activities directly related to-

i. prospecting or exploration of a mineral or petroleum resource; or

ii. extraction and primary processing of a mineral or petroleum resource;

iii. and such environmental authorisation has been obtained; and

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

1. prospecting or exploration of a mineral or petroleum resource; or

2. extraction and primary processing of a mineral or petroleum resource; and

3. such right, permit or exemption has been obtained, and activities authorised in such environmental authorisation, right, permit or exemption commenced after 8 December 2014, such environmental authorisation, right, permit or exemption is regarded as fulfilling the requirements of the Act: Provided that where an application for an environmental authorisation was refused or not obtained in terms of the Act for activities directly

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[2] Government Notice R982 in *Government Gazette* 38282 of 4 December 2014 (as amended)

related to prospecting, exploration or extraction of a mineral or petroleum resource, including primary processing, this sub-regulation does not apply.

b. Where a right or permit issued in terms of the Mineral and Petroleum Resources Development Act, 2002 (Act No. 28 of 2002) for-

i. prospecting or exploration of a mineral or petroleum resource; or

ii. extraction and primary processing of a mineral or petroleum resource; and

iii. the associated Environmental Management Programme or Environmental Management Plan approved in terms of Mineral and Petroleum Resources Development Act, 2002 (Act No. 28 of 2002) is still in effect after 8 December 2014, the requirements contained in Part 3 of Chapter 5 of these Regulations apply to such Environmental Management Programmes or Environmental Management Plans and the first environmental audit report must be submitted to the competent authority no later than 7 December 2019 and at least every 5 years thereafter for the period during which such right, permit, Environmental Management Programme or Environmental Management Plan is still in effect.

iv. Where an environmental authorisation issued in terms of the ECA regulations or the previous NEMA regulations is still in effect by 8 December 2014, the EMPr associated with such environmental authorisation is subject to the requirements contained in Part 3 of Chapter 5 of these Regulations and the first environmental audit report must be submitted to the competent authority no later than 7 December 2019 and at least every 5 years thereafter for the period during which such environmental authorisation is still in effect.

15. The learned Judge ought to have held that Environmental Authorisation was required for certain activities related to mining from legislation that commenced in 1989 (Environment Conservation Act), 1998 (NEMA) and from continued updated and amended Listed Activities published under NEMA to date. Even if the applicants did not know exactly when the activities commenced, the fact remains that Listed Activities would have to have been triggered during the mining operations and, as such, it was

unlawful to commence mining without the requisite environmental authorisation.

16. The learned Judge did not consider that that applicants' argument was never about retrospective application of the law (para 71.1) but about the laws that were in place at the time the various mining activities commenced, including Section 24F of NEMA which prohibited the commencement of listed activities without environmental authorisation. .

17. The learned Judge erred in finding that 24L(4) of NEMA empowers the Minister to regard an approved EMP to be an environmental management authorisation in terms of NEMA (paragraph 71.6). He further erred in finding that Tendele's EMPs constitute "an authorisation in terms of any other legislation" (paragraph 71.7). An approved EMP does not mean that environmental authorisation exists. Rather, section 24L allows for integrated permitting or licencing to take place, of which there is no evidence that such an integrated licence exists in respect of Tendele's mining operations.

18. What the learned Judge should have held instead was, in accordance with the learned Judge Davis, J. in the MaccSand case: (**City of Cape Town v Maccsand 2010 (6) SA 63 (WCC)** at page 77 :-

Section 24L of NEMA seeks to clarify the concept of "the alignment of environmental authorisations " in cases where a listed activity as set out in section 24 of NEMA is also regulated by another law. Section 24L(1) provides that, if the carrying out of the listed activity contemplated in section 24 NEMA "is also regulated in terms of another law" the respective authorities may exercise their powers by inter alia issuing an integrated environmental authorisation.

When these provisions are read together, they support [the] argument that Parliament recognised that activities which required environmental authorisation under NEMA may also be regulated by other legislation which required similar authorisation. Where the requirements for authorisation in

terms of legislation other than NEMA would meet the requirements of such authorisation under NEMA, the legislation indicated the desirability for the organs of state responsible for issuing these authorisations to avoid duplication and to integrate their decision making. But critically, the requirement for environmental authorisation under NEMA in respect of listed activities was not removed because the activity may now be regulated in terms of another law.

19. The learned Judge erred in finding (at paragraphs 71.8 and 102) that the Minister responsible for mineral resources and the minister responsible for environmental affairs must be satisfied with the Tendele's activities and therefore the learned Judge should be too. It is precisely because the Ministers are failing to properly apply the law that the applicants were forced to bring this application before the Court.

20. The learned Judge considered only the 2007 Mining Right (dated 22 June 2007) granted in terms of Section 23 of the Mineral and Petroleum Resources Development Act 28 of 2002 (MPRDA) in respect of coal mining for 27 years until 21st June 2034 in respect of Area 1 on Reserve No 3 (Somkele) No. 15822 measuring 660.5321 hectares. The learned Judged erred in failing to consider (paragraphs 80-88) the mining rights that were issued *after* the relevant planning legislation came into place for areas that had not been mined yet (paragraph 81-84). {At para 81 : KZN PDA came into operation on 1 May 2010 and at para 84: Tendele was already construction its mining operations at Somkhele so it is apparent that its operations do not fall within the definition of "development".} The Judge failed to recognise the mining rights (and subsequent "development") that took place in terms of:

- The 2011 Converted Mining Right (dated 30 March 2011) converted in terms of Item 7 of Schedule II of the MPRDA in respect of coal mining for 20 years up to 29th February 2031 in respect of Areas 2 and 3 on Reserve No. 3 (Somkele) No. 15822 Measuring 779.8719 hectares;
- The 2013 Amendment of a Mining Right (dated 8th March 2013) converted in terms of Section 102 of the MPRDA in respect of coal

mining which added to the 2011 Right the Areas of KwaQubuka and Luhlanga areas on Reserve No. 3 No 15822 measuring 706.0166 hectares; and

- The 2016 Mining Right (dated 26th October 2016) granted in terms of Section 23 of the MPRDA in respect of coal mining for 30 years until 25th October 2046, in respect of One part of the Remainder of Reserve No. 3 No. 15822 in Extent 21 233.0525 hectares.

21. The learned judge ought to have considered that the abovementioned mining rights were in respect of new authorisations for development in the extent of 22 718,941 hectares (227,18941 km^2) without compliance to any planning legislation. These areas are summarised as follows:
    a. 2011 Mining right: 779.8719 hectares
    b. 2013 Mining right: 706.0166 hectares
    c. 2016 Mining right: 21 233.0525 hectares

22. KZN PDA came into effect on 1 May 2010 and SPLUMA in 1 July 2015. Accordingly, the learned Judge erred in finding (paragraph 88) that Tendele was continuing with lawful activity at the time of the commencement of the planning legislation in respect of the abovementioned licences for a total area of 227,18941 km^2 when Tendele commenced with new activities several times since inception in 2007.

23. The learned Judge erred in placing his faith in the promises of Tendele CEO, Mr Du Preez and AMAFA (at paragraphs 92). Again, had Mr Du Preez and AMAFA complied with the necessary legislation, the applicants would not have been forced to bring this matter before the learned Judge in the first place. The fact remains that Tendele has not complied with the applicable legislation relating to cultural heritage and the Judge ought to have acknowledged this illegality.

24. The learned Judge failed to consider (at paragraph 100) that the requirements for a Waste Management Licence under the National Environmental Management: Waste Act (NEMWA) goes back as far as 3

July 2009. In order for Regulation 7(1) to apply (as per the judgment), Tendele would have had to be *lawfully* conducting a waste management activity on the date of the coming into effect of the 3 July 2009 Notice. The learned Judge erred in finding that Tendele was lawfully managing its waste at any time during the history of its operations. While the residue stockpiles and residue deposits were only added to the NEMWA listed activities in 2015, there are other activities that were listed from 3 July 2009 in GN 718 such as:

Category A:

- Activity 3: The storage including the temporary storage of general waste in lagoons (i.e. mine slurry);
- Activity 18: The construction of facilities for activities listed in category A; and/or
- Activity 19 (which is of particular relevance to this matter as it would include instances where Tendele applied for amendments to its mining righs after 3 July 2009): The expansion of facilities or changes to existing facilities for any process or activity, which requires an amendment of an existing permit or license or new permit or license in terms of legislation governing the release of pollution, effluent or waste;

Category B:

- Activity 10: The disposal of general waste to land covering an area in excess of 200m^2;
- Activity 11: The construction of facilities for activities listed in Category B of this Schedule.

There are also activities in this Notice that pertain to treatment of waste water which, only in 2013 were moved to listed activities under NEMA. The learned Judge failed to consider this legislation which rendered Tendele's waste management activities unlawful at the time of the 3 July 2009 Notice coming into effect.

25. Further, the learned Judge's finding that the fourth respondent, the Minister of Environmental Affairs would have had something to say if

Tendele was acting unlawfully in respect of its waste management (at paragraph 102) contradicts his previous finding (at paragraph 7) in which he states that "[a]*part from the second respondent* [Minister of Minerals and Energy] *indicating that he will abide the decision of this court, none of the other respondents have shown any interest in the matter*". It is respectfully averred that the Minister of Environmental Affairs' lack of participation in these proceedings cannot be construed as an active condonation of Tendele's mining operations without a waste management licence.

26. The learned Judge erred in finding (at paragraphs 75-88) that Tendele did not have to obtain land use permission. **Maccsand (Pty) Ltd v City of Cape Town and Others 2012 (4) SA 181 (CC) at para [34] and [40] – [51]** clearly stated that a person could not rely on only a mining licence to mine.

27. The learned Judge failed to find that Tendele was in contravention of the law in its activities and further failed to apply the well-known and accepted principle in **Patz v Greene 1907 TS 42** where the Court is empowered to enforce the prohibition at the instance of an interested party. This is especially so in the case of the enforcement of a constitutional right by interdict. The Learned Judge failed to have regard to the argument put forward in response to the Directive.

28. The learned Judge failed to consider the persuasive value of the Constitutional Court Judgment in **Maledu & Ors v Itereleng Bakgatla Minerals Resources (Pty) Ltd Case No. CCT 265/17.**

29. The learned Judge erred in holding that Applicant relied upon the Maledu Judgment opportunistically. The learned Judge is aware of the obligation on Counsel to make the Court aware of recent judgments of the highest courts, and it was the learned Judge who invited the parties to make submissions.

30. The judgment of the learned Judge is also discordant with the ratio and result in the recent reported case of the Gauteng Division, Pretoria in **Baleni and Others v Minister of Mineral Resources (Case No. 73768/2016)** handed down recently (the Xolobeni Case).

Issue of Costs:

31. Finally, the learned Judge erred in directing the applicants pay the costs of the application.

32. The learned judge failed to consider that the rules and principles governing costs orders – including security for costs – have a *critical* impact on access to justice. The two principles are, firstly, that the court of first instance has a judicial discretion to award costs and secondly, that costs follow the event in that the successful party is usually awarded costs. The larger body of authority sits behind the rule that the second principle yields to the first, the proposition that ultimately emerges is that costs are in the judicial discretion of the judge of first instance.

33. The learned judged failed to acknowledge that the application was brought on the basis of sections Section 24 and Section 38 (c) and (d) of the Constitution. If the trial judge is to make a costs award that is "fair and just between the parties" then this requires closer regard to the actual status of the parties, the effect of an adverse costs order upon them and the differing roles they play in upholding a constitutional democracy.

34. The learned Judge ought to have exercised his discretion and held that on the principles set out by the Constitutional Court in **Ferreira v Levin NO (2) 1996 (2) SA 621 (CC) at [3]** and **Biowatch Trust v Registrar Genetic Resources and Others 2009 (6) SA 232 (CC) at [22]**, and in particular the fact that the respondents were litigating to protect

constitutional rights, it would be appropriate to make no order of costs against the respondents.

35. The learned Judge failed to consider section 32(2) of NEMA which states:

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

36. The learned Judge erred in finding (at paragraph 108.1) that section 28 is an appropriate remedy for not having environmental authorisation. An application to obtain environmental authorisation is the only appropriate remedy. It was made clear in the pleadings that the First and Second Respondents did not agree with the applicants on the need for environmental authorisation and hence an application to Court was the only remedy available.

In the premises and on the grounds set out above or any one or more of them that Applicants have reasonable prospects that an appeal court would find in favour of Applicants.

Applicants submit that the leave to appeal should be granted to the Supreme Court of Appeal with the costs of this application to be costs in the appeal.

DATED AT PIETERMARITZBURG ON THIS 11th DAY OF DECEMBER 2018

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